LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 5 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 418

IN THE MATTER OF THE ESTATE OF
VAN B. HOOPER, DECEASED,

Petitioner,

vs.

THE GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

WARREN H. YOUNG
46 King Street
Christiansted, St. Croix
U. S. Virgin Islands 00821

JAMES W. ASHLEY
THEODORE A. GROENKE
JOHN J. VOORTMAN
111 West Monroe Street
Chicago, Illinois 60603
Attorneys for Petitioner

Of Counsel:

YOUNG, ISHERWOOD AND MARSH
U. S. Virgin Islands

McDERMOTT, WILL & EMERY
Chicago, Illinois

La Salle Street Press—Chicago 60610

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Decision Below is Contrary to the Language and Purpose of Municipal Council Bill No. 39	5
II. The Decision Below is in Conflict With Settled Principles of Administrative Law and With Previous Courts of Appeals Decisions Construing Similar Acts	8
III. The Decision Below Overrules the Findings of Fact of the Tax Exemption Board and Imperils the Validity of all Past and Future Subsidy Grants by the Board	11
Conclusion	13
Appendix A—Findings of Fact, Conclusions of Law and Judgment of the District Court	A-1
Appendix B—Opinion of the United States Court of Appeals	A-6
Appendix C—Municipal Council Bill No. 35	A-23
Appendix D—Municipal Council Bill, No. 39	A-31
Appendix E—Excerpts from Municipal Council Bills Nos. 35 and 39 Compared	A-40
Appendix F—Letter of Application—Van B. Hooper to Tax Exemption Board	A-43

PAGE

Appendix G—Confirmation of Letter of Application to Tax Exemption Board A-45

Appendix H—Letter of July 10, 1951 Recommending Approval of Application A-48

Appendix I—Tax Exemption Certificate Granted to Van B. Hooper A-50

AUTHORITIES

Cases:

Everlasting Development Corp., et al. v. Sol Luis Descartes, 192 F.2d 1 (1st Cir. 1951) 10

King Christian Enterprises, Inc. v. The Government of the Virgin Islands, 345 F.2d 633 (3d Cir. 1965) .. 10

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) 9

Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, A.F.L.-C.I.O. et al., 367 U.S. 396 (1961) 8

Stone v. District of Columbia, 198 F.2d 601 (D.C. Cir. 1952) 7

Statutes:

28 U.S.C. §1254 2

V V.I.C., Title 33, §§4001-4115 2

Municipal Council Bill No. 35 ..... 2, 6

Municipal Council Bill No. 39 ..... 2, 6

Miscellaneous:

Websters International Dictionary, Second Edition. 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No.

IN THE MATTER OF THE ESTATE OF
VAN B. HOOPER, DECEASED,
Petitioner,

vs.

THE GOVERNMENT OF THE VIRGIN ISLANDS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Marine National Exhange Bank, Executor of the Estate of Van B. Hooper, petitions for a Writ of Certiorari on behalf of the Estate to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the case on April 22, 1966.

OPINIONS BELOW

The judgment of the District Court of the Virgin Islands, District of St. Croix, together with its findings of facts and conclusions of law (App. A p. A-1) is unreported. The opinion of the Court of Appeals (App. B p. A-6) is reported at 359 F.2d 569 (3rd Cir. 1966).

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1966. A timely petition for rehearing was filed on May 5, 1966 and was denied on May 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether Bill No. 39 of the Eighth Council-First Session of the Municipal Council of St. Croix permitted the Tax Exemption Board to recommend and the Governor to grant subsidies to a business engaged in providing personal services.

2. Whether an appellate court's factual determination can overrule the political and economic determination of an administrative board when the power to make such a determination is solely within the function of the administrative board.

STATUTE INVOLVED

Municipal Council Bill No. 39, Eighth Council—First Session, 1951, is set out in full in Appendix C at pp. A-23 - A-30.

STATEMENT

On March 20, 1951, Van B. Hooper, the decedent, applied to the Tax Exemption Board of the Municipality of St. Croix for subsidies and tax and fee exemptions under the local subsidy program for encouraging investment.[1]

In his application[2] decedent stated that his business would be:

---

[1] The current statute is found at V Virgin Islands Code Title 33, sections 4001-4115, 1965 cumulative pocket supplement. St. Croix Municipal Council Bill No. 35 in effect when the application was made, and St. Croix Municipal Council Bill No. 39 under which the certificate of tax and fee exemptions and subsidies was granted are found in petitioner's appendices C and D at pp. A-23 and A-31, respectively.

[2] Petitioner's Appendices F and G at pp. A-43 and A-45.

"primarily creative editorial, advertising, tourist promotion and merchandising counsel. This will include the editing, supervising and creating of books, magazines, sales promotion and tourist promotion data."

It was anticipated that, as an initial matter, these services would be performed primarily for "Ideals," a magazine created by Mr. Hooper and published in Milwaukee, Wisconsin.

Decedent estimated that he would employ seven persons in his operation and that it would require a capital investment in excess of $19,000.00.[3]

After extensive investigation the Tax Exemption Board recommended to the Governor that he approve the application conditioned on Mr. Hooper's transferring the necessary capital to the Virgin Islands. This procedure was necessary because Mr. Hooper was unwilling to transfer his equipment and other capital to the Virgin Islands unless he was assured of receiving the subsidy. Tentative approval was granted on that basis.[4] The grant was formally issued March 10, 1952.[5] No contention has ever been made that Mr. Hooper concealed any material fact in his application or that any member of the Tax Exemption Board or the Governor, in recommending and approving the grant, had any conflict of interest, derived any personal benefit, or was affected by any considerations other than the benefit to the economy of the Virgin Islands which would result from the grant.[6] The Third Circuit specifically found that no fraud had been proved.

---

[3] App. G, at p. A-46.

[4] App. H, p. A-48.

[5] App. I, p. A-50.

[6] While the Government of the Virgin Islands argued below that the application was fraudulent in that it contained technical misrepresentations, this claim was found to be without merit by both the District Court and the Court of Appeals and there is, in fact, not a scintilla of evidence of any lack of complete good faith by any party connected with the application.

The decedent pursued his business in St. Croix until he retired in 1960. Subsidy payments for the years 1952-1960 in a total amount of $1,003,932.80 were paid to decedent by a series of checks issued between 1958 and 1962.

On February 20, 1961, the Government Comptroller challenged the grant of subsidy and questioned whether the remaining payments should be made. The Attorney General of the Virgin Islands submitted an opinion that there had been no arbitrary or fraudulent conduct on the part of either decedent or the Tax Exemption Board. The 1961 Tax Exemption Board, together with the Governor and the Attorney General, undertook an extensive re-examination of the grant and on December 29, 1961, concluded that it had been properly made. The remaining subsidy payments were made to decedent.

The decedent died on February 27, 1963, and Letters Testamentary were issued to the Marine National Exchange Bank on April 18, 1963.

On January 31, 1964, the same Attorney General, who previously reviewed and approved the subsidy, filed a Creditor's Claim on behalf of the Government against the decedent's estate to recover the subsidies paid under the grant.

The claim sought to recover "erroneous payment of industrial subsidy under bill No. 39 . . ." The claim was rejected by the executor and the Government of the Virgin Islands requested a hearing on the rejection of the claim. Prior to the hearing the United States Attorney for the Virgin Islands was substituted as counsel in place of the Attorney General of the Virgin Islands.

The District Court, after a full day's hearing, which included testimony of three members of the 1952 Tax Ex-

emption Board, the Acting Governor who initially recommended tax exemption and a member of the 1961 Board which re-examined the grant, concluded that the Government had failed to show fraud, misrepresentation or arbitrary conduct on the part of either decedent, the 1952 Board, or the 1961 Board and disallowed the claim.[7]

The United States Court of Appeals for the Third Circuit reversed.[8] It held that the claim of fraud was without merit but that the grant of the subsidy was "arbitrary." A petition for rehearing was filed on May 5, 1966, and denied, without opinion, on May 12, 1966.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Third Circuit held that the grant of a subsidy to decedent was arbitrary in that the Board acted beyond its authority. That decision is contrary to the language and purpose of the ordinance under which the subsidy was granted, to the previously accepted construction of the ordinance and *is inconsistent with the construction given by the First Circuit to a similar act.* Moreover, the decision, in overruling the factual findings of the Board, has jeopardized all awards of the Tax Exemption Board and the effectiveness of the Virgin Island subsidy program.

I. The Decision Below Is Contrary To The Language And Purpose Of Municipal Council Bill No. 39.

The opinion below is not completely clear. However, to the extent that it is based on the construction of the ordinance, the decision appears to be based on the theory that

---

[7] Findings of Fact and Conclusions of Law dated 7/13/65. App. A, pp. A-1 to A-5.

[8] Opinion filed 4/22/66, App. B, pp. A-6 to A-23.

Bill No. 39 covered only "industrial" businesses involving the manufacture or sale of products or commodities. Decedent's business, which involved providing a personal service, was held not to be within the terms of Bill No. 39.

This construction of Bill No. 39 is in complete conflict with its language, background and purpose. Bill No. 39 covers not only "industries" but enterprises "carrying on any business." Section 3(b) under which decedent's subsidy was granted provides:

> "(b) Each person, firm or corporation qualifying under this Ordinance shall also be entitled to receive a subsidy in an amount equal to 75% of the income tax and 100% of the import duties and other taxes on raw material brought into the Municipality for processing, actually paid into the Treasury of the Municipality by any such person, firms or corporations. This[9] subsidy shall be granted over a period of eight years, beginning not earlier than January 1, 1949."

Section 2 sets the standards for "qualifying under this ordinance." It provides:

> "SECTION 2. For the purpose of this enactment, a person, firm or corporation shall be deemed to be engaged in a new business or industry if duly qualified to do any business in the Municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities *or carrying on any business* which were not being manufactured, processed, created, produced *or carried on* within the said Municipality during the year 1947, and in which business at the time of granting tax or fee exemption or granting of subsidy as hereinafter provided there is a

[9] In the predecessor Bill, Municipal Council Bill No. 35 the word "industrial" appeared here.

demonstrable capital investment of at least ten thousand dollars ($10,000)."[10]

Decedent's activities of providing "editorial, advertising, tourist promotion and merchandising counsel" and "editing, supervising and creating of books, magazines, sales promotion and tourist promotion data" clearly constituted a "business" within the usual, accepted definitions of the word. In *Stone* v. *District of Columbia,* 198 F. 2d 601, 603 (D. C. Cir. 1952), the Court defined "business" as

> "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit. . . . Petitioner engages in the very essence of business in his acts of examination, consideration, decision and administration, all for profit. . . ."

Webster's International Dictionary, Second Edition, defines "business" as "any particular occupation or employment habitually engaged in, especially for livelihood or gain."

The express purpose of this act prohibits a restrictive interpretation of the term "business." The announced purposes of the act, as stated in the first "whereas" clause, were "to attract new capital to the Virgin Islands . . . to the end that the economic life of the Virgin Islands may be as diverse and stable as possible." Both stability and diversity are promoted by as broad as possible a range of economic activity. Stability and diversity are not promoted by a concentration on industry and the exclusion of personal service and other types of business.

The Court's decision limiting eligibility to "industrial" business is particularly incongruous in view of the fact that Bill No. 39 is a restatement, revision and expansion of a

[10] The emphasized language appears for the first time in Bill No. 39.

previous ordinance, Municipal Council Bill No. 35. The primary revisions made by Bill No. 39 were to delete the word "industrial" before the word "subsidy" in Bill No. 35 and, in each case, to add the words "business" or "and other businesses"[11] to the statutory clauses defining the categories of enterprises which the ordinance is designed to encourage and which may qualify for a subsidy. In fact, while petitioner has been unsuccessful in finding any legislative history on Bill No. 39, reading the two bills together compels the conclusion that the principal reason for the enactment of Bill No. 39 was to make it clear that the subsidy program was not limited to "industrial" businesses but that any other type of business might also qualify.[12] The effect of the narrow construction given to the word "business" by the Court below is to nullify the purpose of Municipal Bill No. 39.[13]

II. The Decision Below Is In Conflict With Settled Principles of Administrative Law And With Previous Courts of Appeals Decisions Construing Similar Acts.

The construction of an act by the administrative agency in charge of its enforcement is entitled to great weight and this is particularly true when the construction is of long standing and adopted by the members of the agency in office when the legislation has just been enacted.

In *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, A.F.L.-*

---

[11] Preamble, 1st paragraph, App. D, at p. A-31.

[12] E.g., Preamble, first "Whereas" clause: Section 1, 1st paragraph; Section 1(a); Section 2; Sections 3(a) and 3(b).

[13] To illustrate this point, petitioner, in its Appendix E, pp. A-40 to A-43, has set out the relevant comparable provisions of Bill No. 35 and Bill No. 39 underlining the relevant words of Bill No. 35 which were deleted by Bill No. 39 and the relevant words added by Bill No. 39.

C.I.O., et al, 367 U.S. 396, 408 (1961), the Court refers to the rule that respect is customarily given to a practical administrative construction of a disputed statutory provision and goes on to say that

> "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Norwegian Nitrogen Products Co.* v. *United States,* 228 U.S. 294, 315 (1933).'"

The subsidy granted here under Bill No. 39 of the Municipal Council of St. Croix was the first one granted in St. Croix. No subsidies had been granted under Bill No. 35, the predecessor of Bill No. 39. The Hooper application for the grant was reviewed and approved by the original Tax Exemption Board and the Governor in 1952, was approved by both in 1961, acting upon an opinion of the Attorney General of the Virgin Islands, and finally by the District Court on July 13, 1965.

The Board which granted and the Governor who approved decedent's tax exemptions and subsidies were the Board and Governor in office at the time of the enactment of Bill No. 39. These people, active in business and government, knew that Bill No. 35 required an expansion in its scope since Bill No. 35 as written had attracted no new business to St. Croix. The first case approved under Bill No. 39 was the Hooper application which was given special consideration.

The restrictions which the Court below has, in its decision, placed on the power of the Board to administer the act are inconsistent with the rule in the First Circuit as well as

with the previous construction of this act by the Third Circuit.

In *Everlasting Development Corp., et al.* v. *Sol Luis Descartes,* 192 F. 2d 1 (1st Cir. 1951) the Court held that the essentially political nature of the decision of whether an application qualifies for subsidy under a program similar but somewhat narrower in scope than Bill No. 39, requires that the Board have a broad discretion, including a discretion to define the terms of the statute under which it acts. The Court states at page 6:

> "Whether tax exemption is to be accorded to a particular applicant is not merely a question of law to be determined by reading of and interpretation of statutory language. It involves, moreover, the weighing of complex economic factors, a forecast or prophecy of the extent to which an over-all gain in the Puerto Rican economy, in the direction of the statutory objectives, is to be anticipated from the launching of a proposed new industrial unit with the advantage of tax exemption. In the broad sense, the exercise of such a judgment is political in nature rather than judicial."

The language was quoted with approval and applied by the Third Circuit to the Virgin Island program in *King Christian Enterprises, Inc.* v. *The Government of the Virgin Islands,* 345 F. 2d 633, 636 (3rd Cir. 1965).

While petitioner believes the language of the ordinance, when construed in the context of its purpose and background, is clearly broad enough to cover a personal service business, it is respectfully submitted that even if an ambiguity does exist, it should be resolved in favor of the practical administrative construction adopted by the Board.

III. The Decision Below Overrules The Findings Of Fact Of The Tax Exemption Board And Imperils The Validity Of All Past And Future Subsidy Grants By The Board.

In addition, or possibly as an alternative, to the theory that personal service businesses are not within the scope of the act, the Court relied on the alleged fact that decedent intended to perform and performed the same functions for Ideals in St. Croix that he had previously performed in Milwaukee and on the alleged fact that decedent's activities "did not advance the economic development of the territory. . . ."

The proposition that Mr. Hooper intended to do only the same things in the Virgin Islands as he had done in Milwaukee was given considerable emphasis by the Court but is entirely unsupported by the record.[14] If, as seems probable, the Court meant to imply that decedent had not actually changed his status in relation to Ideals and was still essentially an employee or officer rather than a supplier of a service,[15] not only is its decision, and the record, void of any support for this conclusion, but it is precisely the kind of factual finding which was reserved to the Tax Exemption Board.

---

[14] Decedent's application (App. F, p. A-43) states that he intends to perform certain classes of services without any restriction as to for whom they are to be performed. While he clearly intended to perform services for Ideals, there is no evidence in the record that he intended to serve Ideals exclusively or that he intended to or did supply only the same type of services as he had previously performed as an employee and officer of Ideals.

[15] The Court can hardly have meant that a similarity in the services performed would disqualify decedent's business as a matter of law for there is no reason why one cannot go into the business of doing what he had previously done as an employee even if, as was not shown here, he intends to do and does business only with his former employer.

The factual nature of the Court's conclusion that Mr. Hooper's "activities did not enhance the economic development of the Virgin Islands . . ." is even more apparent and is also unsupported by the record.[16] Moreover, the question is not the actual effect of Mr. Hooper's activities, as viewed with the benefit of hindsight, but whether, at the time of the application, the Board could reasonably have found that his business could be expected to promote the stability and diversity of the economy of the Virgin Islands. Surely the fact that a business granted a subsidy subsequently fails or fails to expand to the extent or in the manner anticipated by the applicant and the Board and is therefore found not to have benefited the economy cannot be grounds for recovering subsidy paid to the business.

In enacting Bill No. 39 the Municipal Council was impressed with the necessity of making a grant by the Board something upon which a prospective applicant could firmly rely. This, as the Council recognized, was necessary if the act was to serve as an effective inducement to invest in the Territory. To that end it declared, in Section 5(b), that the factual determination of the Board should be deemed final unless "conclusively shown" to be "arrived at by arbitrary or fraudulent means."

Moreover, to give the prospective applicant the greatest possible degree of security, the Council, in Section 1(a), stated that it regarded grants of subsidies "as being in the nature of a contract" and promised that it would "not adopt any legislation which may impair or limit such subsidies. . . ."

---

[16] We note that the Court's statements as to the maximum number of persons employed by Mr. Hooper is completely unsupported by the record.

The decision below, in overruling the findings of fact of the Board, constitutes a precedent which jeopardizes that security and gravely endangers the continuing success of the entire program. This danger is compounded when, as here, the Board's findings are overruled in a collateral proceeding long after the grant has expired and at least partially on the basis of alleged facts which could become known only after the grant had been given. Nothing could more surely destroy the ability of the program to encourage new investment than the knowledge by prospective applicants that the Government may come in at any time, as it did here, and recover all subsidies paid on the showing, at most, of nothing more than honest error in the Board's factual findings that the applicant was qualified under the act.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WARREN H. YOUNG
46 King Street
Christiansted, St. Croix
U. S. Virgin Islands 00821

JAMES W. ASHLEY
THEODORE A. GROENKE
JOHN J. VOORTMAN
111 West Monroe Street
Chicago, Illinois 60603
Attorneys for Petitioner

Of Counsel:
YOUNG, ISHERWOOD AND MARSH
U. S. Virgin Islands

McDERMOTT, WILL & EMERY
Chicago, Illinois

APPENDIX A

Findings of Fact, Conclusions of Law and Judgment of the District Court

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DISTRICT OF ST. CROIX
CHRISTIANSTED JURISDICTION

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER, Deceased } PROBATE NO. 5-1963 CLAIM OF VIRGIN ISLANDS GOVERNMENT FOR RETURN OF SUBSIDIES PAID

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter came on to be heard on January 27, 1965 on the claim of the Government of the Virgin Islands. The Government of the Virgin Islands was represented by Almeric L. Christian, Esquire, United States Attorney for the District of the Virgin Islands. The Estate was represented by Young, Isherwood and Marsh (Warren H. Young, Esquire, of counsel). The Court received evidence, heard arguments of counsel, received the transcript of the hearing, read the briefs submitted herein. The premises considered, the Court makes the following:

FINDINGS OF FACT

1. Van B. Hooper, the deceased herein, applied for tax exemption and subsidies on March 20, 1951, under St. Croix Municipal Council Bill No. 35 (passed on June 23, 1949 and approved on June 25, 1949) for the "editing, supervising and creating of books, magazines, sales promotion and tourist promotion data". Public hearings were held on the decedent's application on July 6, 1951.

2. By letter dated July 10, 1951, the Tax Exemption Board of the Municipality of St. Croix recommended to the

Acting Governor of the Virgin Islands that Mr. Hooper's application be tentatively approved conditional upon the transfer of certain assets from the States to St. Croix. The recommendation was approved, tentatively, conditional upon transfer by Mr. Hooper of the assets in question to St. Croix.

3. Bill No. 35 expired by its own terms on December 31, 1951, and was superseded by Bill No. 39, which became law on January 7, 1952. Bill No. 39 was essentially the same as Bill No. 35, but it enlarged upon the scope and coverage of the industrial tax incentive program.

4. By letter dated December 1, 1951, Mr. Hooper advised the Tax Exemption Board of the arrival of the equipment in St. Croix and listed a demonstrable capital investment as of that date in St. Croix of over $22,000.00.

5. A Grant of Tax Exemption and Subsidies pursuant to Bill No. 39 was issued to the deceased on March 10, 1952, covering "the editing, supervising and creating of books, magazines, sales promotion and tourist promotion data", with the effective date stated as March 1, 1951.

6. The deceased received certain tax exemptions for the statutory exempt period of ten years, and subsidies totaling $1,027,534.81, representing 75% of that part of his income taxes attributable to the tax-exempt coverage, were paid to the deceased at various times between January 1958 and August 1962.

7. The Comptroller of the Virgin Islands, by an undated "audit report" made sometime in 1961, objected to the Grant of Tax Exemption and Subsidies to Van B. Hooper, by reason whereof the then constituted Tax Exemption Board reviewed the propriety and validity of the Grant,

with the help of an opinion furnished by the Attorney General of the Virgin Islands.

8. The Tax Exemption Board, in executive session held December 29, 1961, unanimously approved the subsidy payments made to the deceased and, in effect, reconfirmed the propriety and validity of the Grant.

9. The deceased died at Christiansted, St. Croix, V.I., on February 27, 1963, and letters testamentary were granted on April 5, 1963, to the Marine National Exchange Bank of Milwaukee, Wisconsin, the executor named in the Will.

10. The Government of the Virgin Islands filed its claim for erroneous payment of industrial subsidy under Bill No. 39, Municipal Council of St. Croix, totaling $1,003,932.80, on February 24, 1964. The rejection of claim by the Executor was filed on February 24, 1964.

11. The Government of the Virgin Islands has not shown fraud, misrepresentation or arbitrary action by the Tax Exemption Board or Governor of the Virgin Islands.

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The application for tax exemption and subsidies filed on March 20, 1951, by the decedent was made in good faith and was without misrepresentation or fraud.

2. The recommendation of the Tax Exemption Board on July 10, 1951, that the application of Mr. Van B. Hooper be approved, conditioned upon the location of the entire invested capital in St. Croix, not being arbitrary or induced by fraud, are deemed final. *King Christian Enterprises, Inc.* v. *Government of the Virgin Islands,* ____ V.I. ____, ____F.2d____.

3. The Grant of Tax Exemption and Subsidies to Van B. Hooper on March 10, 1952, was made pursuant to Bill No. 39, and the business activity covered by said Grant qualified for such tax exemptions and subsidies.

4. The recommendation made on December 29, 1961, by the Tax Exemption Board approving the subsidies paid to decedent pursuant to the Grant of Tax Exemption and Subsidies, based on its review and findings, was not arbitrary nor induced by fraud, and thus should be deemed to be final.

5. The Grant of Tax Exemptions and Subsidies to Van B. Hooper dated January 7, 1952, is in the nature of a binding contract between claimant and the deceased and may not be revoked, cancelled or rescinded.

6. The claim of the Virgin Islands Government for a return of the subsidies paid to the deceased pursuant to said Grant should be dismissed.

WALTER A. GORDON
Judge of the District Court

July 13, 1965

A-5

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DISTRICT OF ST. CROIX
CHRISTIANSTED JURISDICTION

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER, Deceased

PROBATE No. 5-1963
CLAIM OF VIRGIN ISLANDS GOVERNMENT FOR RETURN OF SUBSIDIES PAID

JUDGMENT

This matter having come on to be heard the 27th day of January, 1965, upon the claim of the Virgin Islands Government, which claim had been rejected by Respondent, and the Court having received the evidence adduced at said hearing and having heard oral argument of counsel (Almeric L. Christian, Esq., United States Attorney, for the Claimant, and Warren H. Young, Esq., of Young, Isherwood and Marsh, for the Respondent), and briefs for both parties having been received by the Court, and the Court being fully advised in the premises, it is

ORDERED that the claim filed herein by the Virgin Islands Government be and the same is hereby dismissed.

Dated the 13th day of July, 1965.

ENTER:
/s/ Walter A. Gordon

Judge

Certified a True Copy this
13 day of July 1965

George A. Mena
Clerk of the Court

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15549

IN THE MATTER OF THE ESTATE OF
VAN B. HOOPER, DECEASED

THE GOVERNMENT OF THE VIRGIN ISLANDS,
Appellant

APPEAL FROM THE DISTRICT COURT OF THE VIRGIN ISLANDS,
DIVISION OF ST. CROIX

Argued at Charlotte Amalie February 3, 1966

Before KALODNER, *Chief Judge,* and MARIS and ALDRICH,*
Circuit Judges.

OPINION OF THE COURT

(Filed April 22, 1966)

By MARIS, *Circuit Judge.*

The Government of the Virgin Islands appeals from a judgment entered in the District Court of the Virgin Islands dismissing a claim filed by the Government against the Estate of Van B. Hooper, deceased, for reimbursement of $1,003,932.80, the amount of subsidies allegedly erroneously paid to the decedent for the tax years 1951 through 1960 under the industrial incentive program of the former Municipality of St. Croix, later of the Territory of the

* By designation.

Virgin Islands.[1] The Government contends that dismissal of the claim by the District Court was erroneous because, as it asserts, the evidence conclusively shows that the grant of tax exemption and industrial subsidy payments to Hooper was an arbitrary action on the part of both the Tax Exemption Board and the Governor and was induced by fraud.

The evidence, which was undisputed, discloses the following facts:

Sometime prior to 1951 the decedent, Van B. Hooper, had organized a publishing company in Milwaukee, Wisconsin, Ideals Publishing Company, of which he was president and principal stockholder. Among other publications of the Company was a magazine called "Ideals" which Hooper had conceived and created and which apparently had a wide circulation. On January 16, 1951 Hooper entered into an agreement with his company to retire from active management thereof but "to render and give all required advice, and any and all creative services required by the Company in connection with preparing the publication of its various books and magazines, and to do any and all creative services required by the Company in connection with preparing the publication of its various books and magazines, and to do any and all research work including photography deemed by said Van B. Hooper as proper and

[1] On January 10, 1955 the functions of the Municipality of St. Croix were transferred to the Government of the Virgin Islands, Revised Organic Act of 1954, § 10, 48 U.S.C.A. § 1576. In 1957 the provisions of the industrial incentive program of St. Croix were codified into 33 V.I.C. §§4001 et seq. (1957 ed.) which provided an industrial incentive program for the entire Territory of the Virgin Islands. However, before the Code went into effect the Legislature enacted the Act of July 5, 1957, No. 224, V.I.Sess.L. 1957, p. 146 et seq., 33 V.I.C. §§ 4001 et seq. (1958 Supp.) which superseded the original provisions of the Virgin Islands Code on the subject.

incident thereto, and to make available to the said Company any or all of his present reference library and any additions thereto, resulting from his research subsequent to the date hereof." In addition he agreed to "direct to the extent required by said Company all research and editorial work, to the end that the publications of said Company will maintain their present standard, and improve as a result of the research and editorial service of said Van B. Hooper." He was not to be paid any further salary but rather to receive a royalty of 15 cents a copy for each copy of Ideals sold and 5 cents a copy for each of the other publications of the Company which were sold.

On March 20, 1951 Hooper applied to the Tax Exemption Board of the former Municipality of St. Croix for tax exemption and industrial subsidy under the Ordinance of the Municipal Council of St. Croix approved June 25, 1949, Bill No. 35, which was available in St. Croix to a person, firm or corporation qualifying as a new industry. In his application he described the type of business in which he proposed to engage as "Primarily creative editorial, advertising, tourist promotion and merchandising counsel. This will include the editing, supervising and creating of books, magazines, sales promotion and tourist promotion data." The amount of demonstrable capital invested was stated to be in excess of $10,000.00.[2]

---

[2]

"ITEMS	ESTIMATED AMT.
Office and Library Furniture & Eqpt.	$ 2,060.00
Remodeling, Painting & Air Conditioning	1,050.00
Reference Library to be Purchased	7,500.00
Photographic Equipment	975.00
Automobile	2,250.00
Working Capital	5,000.00
Estimated total	$19,375.00"

The Tax Exemption Board, which had been appointed under Section 5(a) of the Ordinance and was authorized to investigate all applications for tax or fee exemptions and for the granting of subsidies and to recommend to the Governor whether such applications should be approved or disapproved,[3] on July 10, 1951 recommended to the then acting Governor that Hooper's application be tentatively approved, conditioned, however, upon his transferring his "demonstrable capital investment" from the United States to St. Croix and, subject to that condition, the application was approved by the acting Governor.

On January 7, 1952 the Ordinance of June 25, 1949, Bill No. 35, was repealed and superseded by an Ordinance of the Municipal Council of St. Croix approved January 7, 1952, Bill No. 39. On March 10, 1952 Hooper received a grant of tax exemptions and industrial subsidies under the Ordinance of 1952, Bill No. 39, retroactive to March 5, 1951, for a period of eight years (later extended to ten years) "covering the editing, supervising and creating of books, magazines, sales promotion and tourist promotion data", conditioned upon continued compliance with the Ordinance. Under this grant he received exemptions from certain taxes and was paid industrial subsidies for ten years in an amount equal to 75% of the income tax which he paid into the treasury of the Municipality and later into the treasury of the Territory. No subsidy payments were made to Hooper until 1958 and 1959 when he was paid $659,064.08 for the tax years 1951 through 1958. Later he was paid

[3] In 1957 these functions were transferred to the Virgin Islands Board of Tax Review, which for the purpose of administering the provisions of the program, constituted the Tax Exemption Board to which applications for tax exemptions and subsidies were made. See 33 V.I.C. § 4102(a) (1957 ed.); 33 V.I.C. § 4109 (1958 Supp.); 33 V.I.C. § 4101(a) (1965 Supp.).

$154,604.28 for the tax year 1959 and $190,264.44 for the tax year 1960, a total in all of $1,003,932.80.

Hooper's operation in the Virgin Islands consisted of assorting, selecting, and laying out art work and literary matter which eventually appeared in the magazine "Ideals" and other publications of Ideals Publishing Company. The contents of the magazine consisted principally of previously published poetry and illustrations carefully selected for each issue in keeping with the central theme which had been chosen for the issue. Members of the Company's staff in the Milwaukee office of the Company would go through volumes of poetry with a view to selecting poems relating to the theme. The poems so selected would be checked by other members of the Company's staff in Milwaukee before being sent to Hooper in St. Croix for his final selection and layout. Similar procedure would take place in Milwaukee with respect to prospective illustrations and art work. Then after Hooper had selected and laid out the contents of an issue, in some instances using designs or photographs of his own, he would send the format to the Company in Milwaukee where the printing and publication would take place and from whence the magazine was distributed.

On July 23, 1959 the Government Comptroller of the Virgin Islands filed an audit report taking exception to two payments of subsidy to Hooper based on income tax returns for the years 1951 and 1957. In both cases the exceptions were made on the ground that the payments represented subsidy on income tax paid on non-qualifying interest and dividend income.[4] It further appears that the exception in

[4] The Government Comptroller was acting under the authority of Section 17(c) of the Revised Organic Act of 1954, 48 U.S.C.A. § 1599(c), under which it is his duty "to bring to the attention of the proper administrative officer failures to collect amounts due the government, and expenditures of funds or property which in his opinion are extravagant, excessive, unnecessary, or irregular."

respect to the tax year 1957 was administratively settled but the question remained open in respect to the 1951 tax return. A reaudit by the Comptroller was requested. On February 20, 1961 the Comptroller filed a report on the audit which he had conducted of all the transactions involving the granting of the tax exemptions and industrial subsidies to Hooper. The Comptroller was of the opinion that Hooper's business did "not even, technically, qualify as a Virgin Islands business in itself" nor did it "by any stretch of the imagination come within the definition of 'new industry' within the purview of the intent and purposes contemplated by the Industrial Incentive Act of the Virgin Islands." He took an exception to the industrial subsidy payments to Hooper in the amount of $659,064.08 for the tax years 1951 through 1958, and recommended that the Board of Tax Review (Tax Exemption Board) consider the entire matter for the purpose of revoking the grant and requiring Hooper to return to the Government the amount of subsidy payments made to him, together with taxes and fees from which he had been exempted from payment. On December 29, 1961 the Board[5] reviewed the matter and adopted the opinion of the Attorney General who had expressed the view that there was no merit in any of the Comptroller's objections and that "Determination as to Mr. Van Hooper's eligibility as a 'new business or industry' was within the competence of the Tax Exemption Board and its judgment in this respect may not be reversed in the absence

[5] The Board was authorized to recommend to the Governor, after notice and hearing, the revocation of any tax or fee exemption or denial of any subsidy for the unexpired portion of the period for which subsidy was granted in the event of failure of the grantee to comply with the provisions of the Act and the rules and regulations issued thereunder. St. Croix Ordinance of 1952, Bill No. 39, § 5(a)(3); 33 V.I.C. § 4102(a)(3) (1957 ed.); Act of July 5, 1957, No. 224, § 9(a)(3), V.I. Sess. L. 1957, p. 153; 33 V.I.C. § 4109 (a)(3) (1958 ed.).

of a conclusive showing of arbitrariness or fraud." Subsidy payments were then authorized to be made to Hooper for the remaining tax years 1959 and 1960.

Hooper died on February 27, 1963 and letters testamentary were granted to the Marine National Exchange Bank of Milwaukee, the executor named under the will. The Comptroller on January 22, 1964 filed a supplementary audit report on the grant of the tax exemption and subsidies to Hooper and adhered to his earlier recommendations that action be taken to recover the amounts erroneously paid as subsidies. Accordingly, the Government filed a claim against the estate seeking recovery of $1,003,932.80, the amount allegedly erroneously paid to Hooper, which the executor refused to allow. The Government, pursuant to 15 V.I.C. § 395, then presented its claim against the estate to the district court for allowance.

After holding a hearing and considering the evidence, which was largely documentary, the district court filed findings of fact and concluded, as a matter of law, that the application for tax exemption and subsidies by Hooper had been made in good faith and without misrepresentation or fraud; that the recommendation by the Board to the Governor that the application be approved, conditioned upon the relocation of the invested capital to St. Croix, was not arbitrary or induced by fraud and was "deemed final" and that the grant of subsidies to Hooper was in the nature of a binding contract between the Government and Hooper which "may not be revoked, cancelled or rescinded". On the basis of these findings, a judgment was entered dismissing the Government's claim. This appeal by the Government of the Virgin Islands followed.

The Government contends that the Board, when it considered Hooper's application and recommended its approval, had acted arbitrarily in that certain procedures

laid down by the Ordinances of 1949 and 1952 were not complied with. In this regard we observe that the Government is treating these proceedings as though it were appealing from an administrative order, in which event irregularities in procedure might be corrected upon review. However, in this case the time for review of errors or irregularities which do not go to the jurisdiction of the Board has long since passed. 1921 Code of St. Croix, title III, ch. 52, §§ 2, 4; V.I.C. §§ 1421, 1422. See Lynch v. De Bernal, 1870, 76 U.S. (9 Wall.) 315; 2 Am. Jur. 2d Administrative Law §§ 493-495. Accordingly, these questions are not before us for consideration.

The Executor points out, and rightly so, that this action was brought to rescind a contract[6] on the ground of fraud or arbitrary conduct in its inception. It was upon this basis that the Government sought reimbursement of the industrial subsidy payments allegedly erroneously made to the decedent. We may say at the outset that we see no merit in the Government's contention that the Tax Exemption Board's recommendation was procured by such fraud and deceit as to vitiate the proceedings conducted by the Board. It would serve no useful purpose to discuss the grounds upon which the Government relies in support of its allegation of fraud. Suffice it to say that our review of the record convinces us that the district court did not err in concluding that Hooper's application was made without misrepresentation or fraud and that the recommendation of approval by the Board to the then acting Governor was not induced by fraud.

---

[6] Grants of industrial subsidies and tax exemptions were in the nature of a contract or agreement between the Government and the new industry or business receiving benefits under the industrial incentive program. St. Croix Ordinance of 1952, Bill No. 39, § 1(a); 33 V.I.C. § 4002 (1957 ed.).

We come then to the other ground relied upon by the Government, namely, that the Board was arbitrary, in the sense that it acted wholly contrary to law,[7] in recommending approval of Hooper's application for subsidy for an allegedly new business which was to involve merely his doing editorial work for his magazine published in Milwaukee. Accordingly, we turn to the pertinent provisions of the St. Croix Ordinance of January 7, 1952, Bill No. 39, to determine whether, fairly construed, they can be read to authorize the grant of subsidy to one engaged in such a business as that.

The statutory purpose of the industrial incentive program was stated in Section 1 of the Ordinance to be "to attract new capital to the Municipality of St. Croix and to encourage the establishment of new industries and other business enterprises, and to promote and stabilize the economy". "To achieve this objective," it was further stated in Section 1 of the Ordinance that "exemptions from payment of certain taxes or fees and the granting of special industrial subsidies shall be allowed to new business enterprises as hereinafter provided." To qualify under the Ordinance, the applicant was required to come within the terms of Section 2 which provided as follows:

> "For the purpose of this enactment, a person, firm or corporation shall be deemed to be engaged in a new business or industry if duly qualified to do any business in the Municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities or carrying on any business

[7] Administrative action is arbitrary if it is taken without any authority of law or upon a misconstruction of the statutory authority under which it purports to be taken. Wood v. Waggoner, 1940, 67 S.D. 365, 293 N.W. 188, 189; Montgomery County v. Merlands Club, 1953, 202 Md. 279, 96 A. 2d 261, 267; Ross v. Wilson, 1955, 308 N.Y. 605, 127 N.E. 2d 697, 704; 2 Am. Jur. 2d, Administrative Law, §§ 620, 651.

> which were not being manufactured, processed, created, produced or carried on within the said Municipality during the year 1947, and in which business at the time of granting tax or fee exemption or granting of subsidy as hereinafter provided there is a demonstrable capital investment of at least ten thousand dollars ($10,000). For the purposes of this Ordinance, an article or commodity shall be deemed as having been manufactured, processed, created, or produced within the Municipality during the year 1947 only if it was manufactured, processed, created or produced by an enterprise having in said year a demonstrable capital investment of at least ten thousand dollars ($10,000)."

Under section 3 it was provided that the applicant would be granted exemption from the payment of taxes or fees and would be "eligible for industrial subsidies" in amounts, inter alia, equal to 75% of the applicant's income tax paid into the treasury of the Municipality upon satisfactory proof that the applicant was "engaged in a new business or industry" as defined in section 2. It will be observed that the subsidies were described in the Ordinance as "industrial" in character. In this connection we note that the term "industrial" has been defined to mean "of or pertaining to industry or labor; denoting the processes or products of manufacture or commercial production in general". In re Ginsburg, 3 Cir. 1958, 255 F. 2d 358, 362. We note also that subsidy programs have been adopted in the past by both the Federal Government and various States for specific purposes: e.g., to stabilize the economy, Heinz v. Bowles, Em.App. 1944, 149 F. 2d 277; to encourage increased production, Klies v. Linnane, 1945, 117 Mont. 59, 156 P. 2d 183; and to administer a health program, County of Los Angeles v. State Dept. of Pub. Health, 1958, 158 Cal. App. 2d 425, 322 P. 2d 968. Generally speaking, a subsidy is a grant of public funds or property by a government to a private person to assist in

the establishment or support of an enterprise deemed advantageous to the public. 83 CJS p. 760. Such grants are not intended as mere gratuities or bounties, however, but are necessarily closely articulated with the purposes of the program. See Illinois Packing Co. v. Snyder, Em.App. 1945, 151 F. 2d 337, 339. With these principles in mind, we turn to consider the facts of this case.

It is quite obvious that Hooper did not propose to engage in any business in St. Croix which would involve the manufacture, processing, creation or production of any articles or commodities, as defined in section 2 of the Ordinance. On the contrary, the services which he proposed to perform in St. Croix for his Company in Milwaukee were similar to those which he had rendered in Wisconsin before he entered into the agreement to retire from its active management and control. In that agreement, which had been signed before Hooper came to the Virgin Islands, the Company stated that it recognized "the need for the continued creative and directive ability" of Hooper and the "use of the material which he has accumulated over a period of years, and which has been and is now being used" by the publishing Company "in connection with its several publications" and that the Company had requested Hooper to "continue to render the services heretofore performed by him" and to "make available to it the material which he has previously acquired, and the additional material which he will acquire, which the Company recognizes will be of considerable value to it." The result of the agreement merely was that Hooper transferred his office equipment, library and photographic material from his office in Wisconsin to his office, and later to his home, in St. Croix, and thereafter performed in St. Croix services for his Company identical with some of the services which he had previously rendered to it in Wisconsin.

Moreover Hooper took the position that he was not operating a "business" in St. Croix in the sense of being engaged in a commercial enterprise, for he advised the Tax Exemption Board, in letters dated April 14, 1958, January 29, 1959 and March 8, 1960, that his income was derived only from the personal professional services which he rendered. It was for this reason, he asserted, that he was unable to comply with the directions of the Board to file gross receipts and excise tax reports. In the letter of January 29, 1959, he pointed out that "my business is strictly a personal service, and I do not have occasion to purchase or process raw material as such—so I do not have occasion to prepare a balance sheet and inventory as would the average commercial type business."

It is perfectly clear that Hooper intended to and did perform the work of editor of a magazine printed and published in Milwaukee. In so doing he was merely performing in St. Croix a service for his Company the business of which was conducted in Wisconsin. Such editing of a magazine by remote control might, perhaps, be considered the conduct of a business in the same sense that any officer of a corporation is engaged in the business of furnishing personal services and ideas to his corporation. But it was certainly not the conduct of a business within the meaning of the industrial incentive ordinance and statutes. Hooper did not create a product in the sense of a commercial commodity saleable in the Virgin Islands market. Certainly the format of a magazine prepared by its editor and sent to the publisher on the mainland for the use of its printing force was not such a product. Moreover, it is obvious that Hooper's activities did not advance the economic development of the Territory, which was the basic purpose of the industrial incentive program.[8] For it

[8] Dorem Corporation v. Government of the Virgin Islands, 3 Cir. 1966, 5 V.I. , F. 2d .

appears that his entire payroll during the period of exemption consisted of salary and bonuses paid to his daughter and small sums paid to cleaning women. We conclude that the enterprise in which Hooper proposed to engage and in which he did engage during the tax years 1951 to 1960, inclusive, cannot fairly be held to be a "new business or industry" within the terms of section 2 of the St. Croix Ordinance of 1952, Bill No. 39. It necessarily follows that the Tax Exemption Board in recommending, and the Governor in approving, the grant of tax exemptions and industrial subsidies to Hooper acted arbitrarily in the sense that they exceeded the authority conferred upon them by the Ordinance.

We conclude, also, that the Board on December 29, 1961, when it reviewed the grant of tax exemptions and industrial subsidies to Hooper, was arbitrary in deciding that Hooper continued to qualify as a beneficiary under the industrial incentive program. It will be noted that the original grant to Hooper on March 10, 1952 was "conditioned upon continuing compliance by the grantee with the provisions of Bill No. 39, sanctioned and approved January 7, 1952". This was in conformity with the Ordinance, section 5(a)(3) of which required that the Board recommend to the Governor, after notice and hearing, the revocation of any tax or fee exemption or denial of any subsidy for the unexpired portion of the period upon failure of the beneficiary to comply with the provisions of the Ordinance and the rules and regulations issued thereunder. This provision was continued in effect upon codification of the Ordinance into 33 V.I.C. § 4102(a)(3) (1957 ed.), and in subsequent statutes relating to the industrial incentive program. See Vitex Manufacturing Co. v. Government of Virgin Islands, 3 Cir. 1965, 5 V.I. , 351 F. 2d 313.

The continued receipt of industrial subsidy was predicated upon compliance by the beneficiary with the provisions of the law and the rules and regulations promulgated thereunder and was designed to prevent the diversion of public funds from the accomplishment of the object for which they were intended. See Earl C. Gibbs v. Defense Supplies Corporation, Em.App. 1945, 155 F. 2d 525; Armour & Co. v. Reconstruction Finance Corporation, Em. App. 1947, 162 F. 2d 918, 922. By 1961 the Board had been alerted by Hooper, in his letters to which we have referred above, that his enterprise was not "commercial" in nature, that his services were purely personal and professional and that for this reason he could not comply with the directions of the Board to file certain reports. It was the duty of the Board at that time to consider Hooper's eligibility for continued subsidy payments in the light of the circumstances then existing and it was not bound by earlier findings of the prior Board that Hooper had qualified for tax exemption and industrial subsidies when he had applied in March 1951.

The Executor contends that the grant, being in the nature of a contract between the Government and Hooper, may not be revoked, cancelled or rescinded. It is true that the Ordinance provided that such a grant was to be a contract. But the Ordinance obviously referred in this regard only to grants made to those applicants whose businesses or industries came within the terms of the Ordinance. If, as here, an alleged business did not comply with the terms of the Ordinance no binding contract arose even though the Board and the Governor, acting beyond their authority, purported to grant the subsidies requested. It is well settled that contracts with agents of the Government must be in strict conformity with the authority conferred. Reese v. Government of the Virgin Islands, 3 Cir. 1960, 4 V.I. 177, 184, 277 F. 2d 329, 332-333; Wildermuth

v. United States, 7 Cir. 1952, 195 F. 2d 18, 24. The Government is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. Utah Power & L. Co. v. United States, 1917, 243 U.S. 389, 409, 61 L. ed. 791, 818; United States v. San Francisco, 1940, 310 U.S. 16, 32, 84 L. ed. 1050, 1061; Spencer v. Railroad Retirement Board, 3 Cir. 1948, 166 F. 2d 342; Annotation 1 ALR 2d 338.

What was said by the Supreme Court in Federal Crop Ins. Corp. v. Merrill, 1947, 332 U.S. 380, 384-386, is applicable here:

> ". . . Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. See, e.g., Utah Power & L. Co. v. United States, 243 U.S. 389, 409, 61 L. ed. 791, 818, 37 S. Ct. 387; United States v. Stewart, 311 U.S. 60, 70, 85 L. ed 40, 48, 61 S. Ct. 102, and see, generally, Floyd Acceptances (Pierce v. United States) 7 Wall (U.S.) 666, 19 L. ed 169.
>
> ". . . The oft-quoted observation in Rock Island, A. & L. R. Co. v. United States, 254 U.S. 141, 143, 65 L. ed 188, 189, 41 S. Ct. 55, that 'Men must turn square corners when they deal with the Government, does not reflect a callous outlook. It merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.
>
> . . .

> ". . . The circumstances of this case tempt one to read the regulation, since it is for us to read it, with charitable laxity. But not even the temptations of a hard case can elude the clear meaning of the regulation."

We conclude that the Tax Exemption Board and the Governor exceeded their powers under the Ordinance in making the subsidy grant to Hooper. Their action was arbitrary because it was not according to law. Having paid the subsidies under a mistake of law the Government is entitled to reimbursement from Hooper's Estate of the amounts erroneously paid to him, totalling $1,003,932.80. Wisconsin Central R. Co. v. United States, 1896, 164 U.S. 190; Aebli v. Board of Education, 1944, 62 Cal. App. 2d 706, 145 P. 2d 601, 611; State v. McCarty, 1955, 76 Idaho 153, 279 P. 2d 879, 881. See, also, Restatement, Restitution § 46(a).

The Executor argues that the Government's claim is barred under the general statute of limitations, 5 V.I.C. § 31. This contention is wholly without merit. In the absence of an express waiver of its immunity, the Government of the Virgin Islands is not bound by the general statute of limitations. The Territory of the Virgin Islands is a body politic. While not sovereign, in the true sense of that term, the Revised Organic Act has conferred upon it attributes of autonomy similar to those of a sovereign government or a state. Harris v. Municipality of St. Thomas and St. John, D.C.V.I. 1953, 2 V.I. 251, 111 F. Supp. 63, affirmed 3 Cir. 1954, 3 V.I. 502, 212 F. 2d 323. Accordingly, the general principle that claims of the sovereign are not subject to the defenses of laches and the statute of limitations, is applicable to the Territory, unless expressly waived, and is implied in all its enactments. See Jackson County v. United States, 1939, 308 U.S. 343, 351. This im-

munity is based upon the public policy of protecting the citizens from damage to or loss of their public rights and property through the negligence of public officers. Guaranty Trust Co. of N. Y. v. United States, 1938, 304 U.S. 126, 132.

The order of the district court dismissing the claim of the Government will be reversed and the cause remanded with directions to allow the claim.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

MUNICIPAL COUNCIL BILL No. 35

SEVENTH COUNCIL—FIRST SESSION

1949

ORDINANCE

to Encourage the Establishment of New Industries and the Promotion of Tourism in the Virgin Islands Through the Granting of Exemptions from the Payment of Certain Taxes and Fees, and the Granting of Special Industrial Subsidies, and for other Purposes.

WHEREAS, It is deemed a desirable public policy to encourage the establishment of as many self-sustaining enterprises in the Virgin Islands as the natural resources will permit and to promote tourist development to the end that the economic life of the Virgin Islands may be as diverse and profitable as possible; and,

WHEREAS, It is deemed advisable for the Municipal Government to extend such inducement and render such aid as will encourage persons to invest in the Virgin Islands for the purposes of establishing and developing permanent manufacturing enterprises that will not compete with already established industries:

Be it enacted by the Municipal Council of St. Croix in session assembled:

SECTION 1. It is hereby declared the policy of the Municipal Council of St. Croix to encourage the establishment of new industries and to promote tourism in the Municipality of St. Croix in order to improve the economy of the Municipality. To achieve this objective, exemptions from pay-

ment of certain taxes or fees and the granting of special industrial subsidies shall be allowed as hereinafter provided.

(a) In order that the encouragement tendered by this Ordinance in the form of subsidies for the promotion of the industrial development of the Municipality of St. Croix may be an incentive, having a real and unmistakably sure basis, the Municipal Council of St. Croix hereby declares that it considers all subsidies or tax exemptions granted under the provisions of this Ordinance as being in the nature of a contract or agreement between the Government of the Municipality of St. Croix and the industry receiving the benefit of the subsidies or tax exemptions, and that it proposes not to adopt any legislation which may impair or limit such subsidies or tax exemptions or which may defeat the purposes of this Ordinance.

SECTION 2. For the purposes of this enactment a person, firm or corporation shall be deemed to be engaged in a new industry if duly qualified to do any business in the Municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities which were not being manufactured, processed, created or produced within the said Municipality during the year 1947, and in which business at the time of application for tax or fee exemption or granting of industrial subsidy as hereinafter provided there is a demonstrable capital investment of at least ten thousand ($10,000) dollars. For the purposes of this Ordinance, an article or commodity shall be deemed as having been manufactured, processed, created or produced within the Municipality during the year 1947 only if it was manufactured, processed, created or produced by an enterprise having in said year a demonstrable capital investment of at least ten thousand ($10,000) dollars.

SECTION 3. From and after the date of approval hereof, all persons, firms, or corporations shall, upon application

therefor, be granted exemption from the payment of the taxes or fees and shall be eligible for industrial subsidies as specified in section 3, subsections (a), (b) and (c) hereof, upon satisfactory proof that such person, firm or corporation is engaged in a new industry as hereinbefore defined, the said exemption and subsidies to last for a period of eight years; provided, that application for tax or fee exemption and the granting of subsidies under this Ordinance shall be made not later than December 31, 1951; *provided,* that in the case of any business or enterprise engaged in the manufacture, creation or production of more than one article or commodity, the exemption from payment of taxes or fees or granting of industrial subsidies shall be restricted and limited only to such portion of such business or enterprise as is engaged in the manufacture, processing, creation or production of a new article or commodity within the meaning and spirit of this Ordinance.

(a) Persons, firms, or corporations qualifying as being engaged in new industries shall be exempt from the payment of the following taxes or fees, except for one ($1) dollar per annum for tax in each category specified, as otherwise would be applicable to such new industry and to property used therein, in accordance with the provisions of this Ordinance:

1. All real property taxes.
2. All trade taxes or excise taxes on building materials, furnishings, and equipment necessary for the construction and operation of any new industry; provided that this provision shall be applicable to construction of any new industry or the operation thereof which has been commenced after January 1, 1948.
3. All annual or specific license fees, except liquor license fees and automobile license fees.

(b) Each person, firm, or corporation qualifying under this Ordinance shall also be entitled to receive an industrial subsidy in an amount equal to 75% of the income tax actually paid into the Treasury of the Municipality by any such persons, firms or corporations. This subsidy shall be granted over a period of eight years, beginning not earlier than January 1, 1949.

(c) An industrial subsidy shall be allowed over a period of eight years beginning not earlier than January 1, 1949, to all stockholders in any new industry in an amount equal to 75% of the Income Tax actually paid into the Municipality by any such stockholders on the dividends or profits derived by any such stockholders from the operation of the industry covered under this Law.

SECTION 4. The Assistant Commissioner of Finance shall compute and determine annually the specific amount of the subsidy to which each applicant therefor is entitled, and he is hereby authorized to make payment of said subsidy in each case to the person, firm or corporation entitled to receive same from funds available in the special fund in the general treasury of the Municipality of St. Croix hereinafter provided in Section 10, and the Municipal Council of St. Croix shall appropriate sufficient funds in each annual budget to carry out the provisions of this Ordinance.

SECTION 5(a). The provisions of this Ordinance shall be administered by a Tax Exemption Board, which is hereby created, subject to the supervision of the Governor. The Tax Exemption Board shall be comprised of the Assistant Commissioner of Finance, two representatives of Business and two representatives of Labor, to be appointed by the Governor, by and with the advice and consent of the Municipal Council. The members of the Board shall serve

for two years, and until their successors are appointed and qualified, and shall be eligible for reappointment; provided, that of the first four appointees to the Board, two, to be selected by lot, shall serve for one year and until their successors are appointed and qualified, and thereafter appointees shall serve for two years as herein provided. The Board shall elect its own officers from among its members. They shall be entitled to travel allowance and such other compensation as may be provided in the Municipal Budget. Members of the Board may be removed by the Governor for cause. All applications for tax or fee exemptions and for the granting of subsidies under this Ordinance shall be made to the said Board. In the performance of its duties hereunder the said Board shall exercise the following powers and authority, subject to the approval of the Governor:

1. Investigate all applications for tax or fee exemption and for the granting of subsidies hereunder, and recommend to the Governor that such applications be approved or disapproved in accordance with the provisions of this Ordinance; provided, that the Board shall make its recommendations to the Governor within sixty (60) days after receipt of application; and provided further that the Governor shall approve or disapprove the application within thirty (30) days after receipt of the Board's recommendations.

2. Recommend to the Governor the revocation of any tax or fee exemption or denial of any subsidy for the unexpired portion of the period for which granted in the event of the failure of a person, firm, or corporation to which such exemption or subsidy was granted to comply with the provisions of this Ordinance and rules and regulations issued in accordance therewith.

3. Adopt rules and regulations, subject to the approval of the Governor by and with the advice and consent of the Municipal Council.

(b) Decisions of the Board as to questions of fact shall be deemed final in any proceedings of any court except in such cases as it shall be conclusively shown that any such decision was arrived at by arbitrary or fraudulent means.

SECTION 6. The Board shall give public notice in all local newspapers of general circulation of all applications for tax or fee exemption and for subsidies. It shall accept and consider statements from any person, firm or corporation interested in the approval or disapproval of an application; provided a written statement is submitted prior to the hearing.

SECTION 7. Notwithstanding other provisions hereof, hotels shall be eligible for the tax or fee exemptions and the subsidies provided for in this Ordinance; and for the purposes of this provision a hotel shall be considered any establishment for the accommodation of the public, including housing and feeding of paying guests, and any cottage resort affording the above accommodations, in which at the time of application for tax or fee exemption or for subsidy there is a demonstrable capital investment of at least one hundred thousand dollars ($100,000), provided that application for tax or fee exemption and the granting of subsidies hereunder shall be made no later than December 31, 1951.

SECTION 8. Upon the recommendation of the Board tax or fee exemptions and subsidies as herein provided for shall be granted in the name of the Government of the Virgin Islands by the Governor.

SECTION 9. Not less than seventy-five per cent (75%) of all persons employed in any new industry subject to this

Law shall be legal residents of the Virgin Islands; provided that the Board shall have the right to grant temporary permits to any new industry applying for or receiving benefits under this Law to employ a greater percentage of non-residents of the Virgin Islands, when it is conclusively proven to the Board that residents with the necessary ability to perform the services required are not available within the Virgin Islands and the industry is or will be greatly handicapped as a result, and provided further that the Board shall revoke or modify the permit whenever it appears that the necesary services have become available within the Virgin Islands. The permit shall be granted only upon application of the new industry and after a public hearing has been held and all interested persons given an opportunity to be heard. Public notice shall be given in all newspapers of the Virgin Islands of the date, time, place and nature of the hearing and the subsequent decision of the Board.

The word "resident" for the purpose of this Law shall mean any person whose residence is established in the Virgin Islands and who has resided continuously in the Virgin Islands for not less than one (1) year.

SECTION 10. "The portion of income tax payments and trade or excise taxes made by corporations, partnerships and other persons entitled to subsidies which are to be refunded under this Ordinance shall be covered into a special account in the municipal treasury. This account shall be available without further legislation for the payment of income tax refunds authorized by law and subsidies authorized under this Act."

SECTION 11. If any provision of this Ordinance or the application thereof to any person or circumstances is held invalid, the remainder of the Ordinance and the application

of such provisions to other persons or circumstances shall not be affected thereby.

SECTION 12. All laws, ordinances or parts thereof, in conflict with this Ordinance are hereby repealed.

Thus duly passed in an extraordinary meeting of the Municipal Council of St. Croix held Thursday, June 23, 1949.

Witness our Hands and Seal of the Municipal Council of St. Croix, Virgin Islands of the United States this twenty-third day of June, A. D. 1949.

LUDVIG E. HARRIGAN
Chairman.

ALPHONSO S. FORBES
Secretary.

The above Ordinance is hereby sanctioned and approved.

Witness my hand and the Seal of the Government of the Virgin Islands of the United States at Charlotte Amalie, St. Thomas, V. I., this twenty-fifth day of June, A.D. 1949.

[SEAL]

MORRIS F. DE CASTRO
Acting Governor.

APPENDIX D

MUNICIPAL COUNCIL BILL No. 39

EIGHTH COUNCIL—FIRST SESSION

1951

ORDINANCE

to Encourage the Establishment of New Businesses and Industries and the Promotion of Tourism in the Virgin Islands through the Granting of Exemptions from the Payment of Certain Taxes and Fees, and the Granting of Special Subsidies, and for other purposes.

WHEREAS, it is deemed a desirable public policy to attract new capital to the Virgin Islands and to encourage the establishment of as many self-sustaining enterprises in the Virgin Islands as the natural resources will permit and to promote tourist development to the end that the economic life of the Virgin Islands may be as diverse and stable as possible; and,

WHEREAS, it is deemed advisable for the Municipal Government to extend such inducement and render such aid as will encourage persons to invest in the Virgin Islands for the purposes of establishing and developing new permanent manufacturing and other business enterprises that will not be in direct competition with already established industries or businesses:

BE IT ENACTED by the Municipal Council of St. Croix in session assembled:

SECTION 1. It is hereby declared the policy of the Municipal Council of St. Croix to attract new capital to the Municipality of St. Croix and to encourage the establish-

ment of new industries and other business enterprises, and to promote and stabilize the economy of the Municipality. To achieve this objective, exemptions from payment of certain taxes or fees and the granting of special industrial subsidies shall be allowed to new business enterprises as hereinafter provided.

(a) In order that the encouragement tendered by this Ordinance in the form of subsidies for the promotion of the business and industrial development of the Municipality of St. Croix may be an incentive, having a real and unmistakably sure basis, the Municipal Council of St. Croix hereby declares that it considers all orders granting subsidies or tax exemptions under the provisions of this Ordinance as being in the nature of a contract or agreement between the Government of the Municipality of St. Croix and the new industry or business receiving the benefit of the subsidies or tax exemptions, and that it will not adopt any legislation which may impair or limit such subsidies or tax exemptions granted hereunder or which may defeat the purposes of this Ordinance.

SECTION 2. For the purpose of this enactment, a person, firm or corporation shall be deemed to be engaged in a new business or industry if duly qualified to do any business in the Municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities or carrying on any business which were not being manufactured, processed, created, produced or carried on within the said Municipality during the year 1947, and in which business at the time of granting tax or fee exemption or granting of subsidy as hereinafter provided there is a demonstrable capital investment of at least ten thousand dollars ($10,000). For the purposes of this Ordinance, an article or commodity shall be deemed as having been manufactured, processed, created, or produced within the Munic-

ipality during the year 1947 only if it was manufactured, processed, created or produced by an enterprise having in said year a demonstrable capital investment of at least ten thousand dollars ($10,000).

SECTION 3. From and after the date of approval hereof, all persons, firms, or corporations shall, upon application thereof, as hereinafter provided, be granted exemption from the payment of the taxes or fees and shall be eligible for industrial subsidies as specified in Section 3, sub-sections (a), (b) and (c) hereof, upon satisfactory proof that such person, firm or corporation is engaged in a new business or industry as hereinbefore defined, the said exemption and subsidies to last for a period of eight years from the order granting such exemption or subsidy; provided, that application for tax or fee exemption and the granting of subsidies under this Ordinance shall be made not later than December 31, 1952; provided, that in the case of any business or enterprise engaged in the manufacture, creation or production of more than one article or commodity the exemption from payment of taxes or fees or granting of industrial subsidies shall be restricted and limited only to the portion of such business or enterprise as is not in competition with businesses existing in the Municipality during 1947 within the meaning and spirit of this Ordinance.

(a) Persons, firms or corporations qualifying as being engaged in new businesses or industries shall be exempt from the payment of the following taxes or fees, except for one dollar ($1.00) per annum for tax in each category specified as otherwise would be applicable to such new business or industry and to property used therein, in accordance with the provisions of this Ordinance:

1. All real property taxes.

2. All trade taxes or excise taxes on building materials, furnishings, and equipment necessary for the construction of any new business or industry, provided that this provision shall be applicable to construction of any new industry or the operation thereof which has been commenced after January 1, 1948.

3. All annual or specific license fees, except liquor license fees and automobile license fees.

(b) Each person, firm or corporation qualifying under this Ordinance shall also be entitled to receive a subsidy in an amount equal to 75% of the income tax and 100% of the import duties and other taxes on raw material brought into the Municipality for processing, actually paid into the Treasury of the Municipality by any such persons, firms or corporations. This subsidy shall be granted over a period of eight years, beginning not earlier than January 1, 1949.

(c) An industrial subsidy shall be allowed over a period of eight years beginning not earlier than January 1, 1949, to all stockholders or partners in any new business or industry in an amount equal to 75% of the Income Tax actually paid into the Municipality by any such stockholders on the dividends or profits derived by any such stockholders or partners from the operation of the industry covered under this law.

SECTION 4. The Assistant Commissioner of Finance shall compute and determine annually the specific amount of the subsidy to which each person, firm or corporation granted a subsidy hereunder is entitled, and he is hereby authorized to make payment of said subsidy in each case to the person, firm or corporation entitled to receive same from funds available in the special funds in the general treasury of the

Municipality of St. Croix hereinafter created in Section 10, and the Municipal Council of St. Croix shall appropriate sufficient funds in each annual budget to carry out the provisions of this Ordinance.

Section 5(a). The provisions of this Ordinance shall be administered by a Tax Exemption Board, which is hereby created, subject to the supervision of the Governor. The Tax Exemption Board shall be comprised of the Assistant Commissioner of Finance, two representatives of Business and two representatives of Labor, to be appointed by the Governor, by and with the advice and consent of the Municipal Council. The members of the Board shall serve for two years, and until their successors are appointed and qualified and shall be eligible for reappointment; provided, that of the first four appointees to the Board two, to be selected by lot, shall serve for one year and until their successors are appointed and qualified and thereafter appointees shall serve two years as herein provided. They shall be entitled to travel allowance and such other compensation as may be provided in the Municipal Budget. Members of the Board may be removed by the Governor for cause. All applications for tax or fee exemptions and for the granting of subsidies under this Ordinance shall be made to the said Board. In the performance of its duties hereunder the said Board shall exercise the following powers and authority, subject to the approval of the Governor:

1. Conduct preliminary hearings, after due notice to all interested parties, with respect to applications for tax or fee exemption and for the granting of subsidies hereunder. At such hearing the Board shall determine whether (1) the proposed new enterprise is one which can reasonably be expected to qualify as a new business or industry under the provisions of this Ordinance; and (2) whether not

less than $10,000 will be required and available for its establishment. On the basis of its findings, and not later than 60 days after receipt of application, the Board shall recommend to the Governor that the application be approved or disapproved, and in the event approval is recommended that a temporary certificate of tax or fee exemption, or qualification for subsidy be issued to the applicant conditioned upon actual compliance with the provisions of the law within a stated period.

2. Upon application of any person granted a temporary certificate in accordance with the preceding paragraph, or upon the expiration of any time limit set in such a certificate, as the case may be, recommend to the Governor the final approval or disapproval of applications made hereunder; provided that if the Governor shall fail to either approve or disapprove the application within thirty days after receipt of the Board's recommendation the same shall at the end of such period be deemed approved.

3. Recommend to the Governor, after notice and hearing, the revocation of any tax or fee exemption or denial of any subsidy for the unexpired portion of the period for which granted in the event of the failure of a person, firm or corporation to which such exemption or subsidy was granted to comply with the provisions of this Ordinance, and rules and regulations issued in accordance therewith.

4. Adopt rules and regulations, subject to the approval of the Governor.

(b) Decisions of the Board as to questions of fact shall be deemed final in any proceedings of any court except in such cases as it shall be conclusively shown that any such decision was arrived at by arbitrary or fraudulent means.

Section 6. The Board shall prescribe the procedure for all applications for tax or fee exemption and for subsidies,

and shall give public notice in all local newspapers published and of general circulation in the Municipality of St. Croix of all applications. Any person, firm or corporation interested in the approval or disapproval of an application may file a written statement with the Board prior to the hearing on such application.

Section 7. Notwithstanding other provisions hereof, hotels shall be eligible for the tax or fee exemptions and the subsidies provided for in this Ordinance; and for the purposes of this provision a hotel shall be considered any establishment for the accommodation of the public, including housing and feeding of paying guests, and any cottage resort affording the above accommodations, in which at the time of application for tax or fee exemption or for subsidy there is a demonstrable capital investment of at least one hundred thousand dollars ($100,000), provided that application for tax or fee exemption and the granting of subsidies hereunder shall be made no later than December 31, 1962. A subsidy shall be allowed over a period of eight years beginning not earlier than January 1, 1949, to all stockholders or partners in any hotel in any amount equal to 75% of the income tax actually paid into the Municipality by any such stockholders on the dividends or profits derived by any such stockholders or partners from the operation of the hotel covered under this law.

Section 8. Upon the recommendation of the Board tax or fee exemptions and subsidies as herein provided for shall be granted in the name of the Government of the Virgin Islands by the Governor.

Section 9. Not less than seventy-five per cent (75%) of all persons employed in any new industry subject to this Law shall be legal residents of the Virgin Islands; provided that the Board shall have the right to grant tempo-

rary permits to any new industry applying for or receiving benefits under this Law to employ a greater percentage of nonresidents of the Virgin Islands, when it is conclusively proven to the Board that residents with the necessary ability to perform the services required are not available within the Virgin Islands and the industry is or will be greatly handicapped as a result and provided further that the Board shall revoke or modify the permit whenever it appears that the necessary services have become available within the Virgin Islands. The permit shall be granted only upon application of the new industry and after a public hearing has been held and all interested persons given an opportunity to be heard. Public notice shall be given in all newspapers of the Virgin Islands of the date, time, place and nature of the hearing and the subsequent decision of the Board.

The word "resident" for the purpose of this Law shall mean any person whose residence is established in the Virgin Islands and who has resided conntinuously in the Virgin Islands for not less than one (1) year.

Section 10. Trade or excise taxes or import duties or income tax payments made by persons qualifying under this Ordinance shall be covered into a special account in the Municipal Treasury. The proper officers are hereby authorized without further legislation to make refunds of such taxes authorized under this Act from the moneys in such special account.

Section 11. No tax or fee exemption or subsidy granted hereunder shall be revoked, modified, or rescinded under paragraph 3 of Section 5(a) hereof, without notice and hearing under such rules as may be promulgated by the Board from time to time.

Section 12. If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the Ordinance and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 13. All laws, ordinances or parts thereof, in conflict with this Ordinance are hereby repealed.

Thus passed by the Municipal Council of St. Croix in an extraordinary meeting held on Thursday, December 27, 1951.

Witness our hands and Seal of the Municipal Council of St. Croix this twenty-seventh day of December, A.D., 1951.

ERIC H. CARROLL
Chairman.

CYPRIAN A. GARDINE
Secretary.

The above Ordinance is hereby sanctioned and approved.

Witness my hand and the Seal of the Government of the Virgin Islands of the United States at Charlotte Amalie, St. Thomas, V. I., this 7th day of January, A.D. 1952.

[SEAL]

MORRIS F. DE CASTRO
Governor.

APPENDIX E

Excerpts from Municipal Council Bills Nos. 35 and 39 Compared

BILL No. 35 ORDINANCE	BILL No. 39 ORDINANCE
to Encourage the Establishment of New Industries and the Promotion of Tourism in the Virgin Islands Through the Granting of Exemptions from the Payment of Certain Taxes and Fees, and the Granting of Special *Industrial* Subsidies, and for other Purposes.	to Encourage the Establishment of New *Businesses and* Industries and the Promotion of Tourism in the Virgin Islands through the Granting of Exemptions from the Payment of Certain Taxes and Fees, and the Granting of Special Subsidies, and for other purposes.
• • •	• • •
WHEREAS, It is deemed advisable for the Municipal Government to extend such inducement and render such aid as will encourage persons to invest in the Virgin Islands for the purposes of establishing and developing permanent manufacturing enterprises that will not compete with already established industries.	WHEREAS, It is deemed advisable for the Municipal Government to extend such inducement and render such aid as will encourage persons to invest in the Virgin Islands for the purposes of establishing and developing new permanent manufacturing *and other business* enterprises that will not be in direct competition with already established industries *or businesses*:
• • •	• • •
SECTION 1. It is hereby declared the policy of the Municipal Council of St. Croix to encourage the establishment of new industries and to promote tourism in the Municipality of St. Croix in order to improve the economy of the Municipality. To achieve this objective, exemptions from payment of certain taxes or fees and the granting of special industrial subsidies shall be allowed as hereinafter provided.	SECTION 1. It is hereby declared the policy of the Municipal Council of St. Croix to *attract new capital* to the Municipality of St. Croix and to encourage the establishment of new industries *and other business enterprises*, and to promote *and stabilize* the economy of the Municipality. To achieve this objective, exemptions from payment of certain taxes or fees and the granting of spe-

BILL No. 35

(a) In order that the encouragement tendered by this Ordinance in the form of subsidies for the promotion of the industrial development of the Municipality of St. Croix may be an incentive, having a real and unmistakably sure basis, the Municipal Council of St. Croix hereby declares that it considers all subsidies or tax exemptions granted under the provisions of this Ordinance as being in the nature of a contract or agreement between the Government of the Municipality of St. Croix and the industry receiving the benefit of the subsidies or tax exemptions, and that it proposes not to adopt any legislation which may impair or limit such subsidies or tax exemptions or which may defeat the purposes of this Ordinance.

SECTION 2. For the purposes of this enactment a person, firm or corporation shall be deemed to be engaged in a new industry if duly qualified to do any business in the Municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities . . .

* * *

BILL No. 39

cial industrial subsidies shall be allowed *to new business enterprises* as hereinafter provided.

(a) In order that the encouragement tendered by this Ordinance in the form of subsidies for the promotion of the *business and* industrial development of the Municipality of St. Croix may be an incentive, having a real and unmistakably sure basis, the Municipal Council of St. Croix hereby declares that it considers all orders granting subsidies or tax exemptions under the provisions of this Ordinance as being in the nature of a contract or agreement between the Government of the Municipality of St. Croix and the new industry *or business* receiving the benefit of the subsidies or tax exemptions, and that it will not adopt any legislation which may impair or limit such subsidies or tax exemptions granted hereunder or which may defeat the purposes of this Ordinance.

SECTION 2. For the purpose of this enactment a person, firm or corporation shall be deemed to be engaged in a new *business or* industry if duly qualified to do any business in the Municipality of St. Croix involving the manufacture, processing, creation or produc-

BILL No. 35

SECTION 3.

* * *

(a) Persons, firms, or corporations qualifying as being engaged in new industries shall be exempt from the payment . . .

* * *

(b) Each person, firm, or corporation qualifying under this Ordinance shall also be entitled to receive an *industrial* subsidy . . .

BILL No. 39

tion of any articles or commodities *or carrying on any business* . . .

* * *

SECTION 3.

* * *

(a) Persons, firms, or corporations qualifying as being engaged in new *business or* industries shall be exempt from the payment . . .

* * *

(b) Each person, firm, or corporation qualifying under this Ordinance shall also be entitled to receive a subsidy . . .

APPENDIX F

Letter of Application—Van B. Hooper to Tax Exemption Board

VAN B. HOOPER

Christiansted,
St. Croix, Virgin Islands

Tax Exemption Board
MUNICIPALITY OF ST. CROIX March 20, 1951.
Christiansted, St. Croix, V.I.

Gentlemen:

I hereby make application, as an individual, for Income Tax and other Tax and Fee Exemptions as provided for in Municipal Council Bill No. 35, as enacted by the Municipal Council of St. Croix on June 23, 1949.

The nature of business will be primarily creatived editorial, advertising, tourist promotion and merchandising counsel. This will include the editing, supervising and creating of books, magazines, advertising, sales promotion and tourist promotion data.

The physical requirements of this business will include the establishing of business and editorial offices and a reference library.

Estimated requirements of employees:

(Skilled) - One librarian, secretary, accountant, stenographer.

(Semi-skilled) - Filing clerk, assistant librarian.

(Un-skilled) - Janitress, handyman.

This is an established going business and the transferring of its legal headquarters to St. Croix will result in an immediate substantial additional tax revenue to the Municipal Treasury of St. Croix.

Business references - The applicant is President of IDEALS PUBLISHING CO., Milwaukee, Wisconsin, and is a member of the Milwaukee Association of Commerce and Better Business Bureau of Milwaukee.

Banking references - Marine National Exchange Bank, Marshall and Ilsley Bank, City Trust and Savings Bank and Park Savings Bank, all of Milwaukee, Wisconsin.

In full keeping with the spirit of Municipal Council Bill No. 35, the applicant plans to establish his permanent residence in St. Croix and to employ, as far as possible, only residents of St. Croix.

Respectfully submitted for your approval and acceptance this 20th day of March, 1951.

Signed.....

Subscribed and sworn before me at Christiansted, St. Croix, V.I., this 20th day of March, A.D.

Notary Public

APPENDIX G

Confirmation of Letter of Application to Tax Exemption Board

COPY of—(6 copies submitted)

CONFIRMATION OF
ORIGINAL APPLICATION
DATED MARCH 20, 1951.

APPLICATION
FOR TAX AND FEE EXEMPTION AND
INDUSTRIAL SUBSIDY

To: The Tax Exemption Board, Municipality of St. Croix,
Christiansted St. Croix, Virgin Islands of U.S.

The undersigned hereby requests Tax and Fee Exemption and Industrial Subsidy in accordance with the provisions of the Ordinance to Encourage the Establishment of New Industries and the Promotion of Tourism in the Virgin Islands Through the Granting of Exemptions from the payment of Certain Taxes and Fees, and the Granting of Special Industrial Subsidies, and for other purposes, approved June 25, 1947. The following information is furnished in connection with this application, viz:

Name of Applicant VAN B. HOOPER
Address CHRISTIANSTED, ST. CROIX, VIRGIN ISLANDS

Nature of organization (single proprietorship, partnership, corporation, etc.). If partnership, state names of individual partners and their respective interests:

SINGLE PROPRIETORSHIP

State when organized and under laws of what county, territory or state:

XXXXXXXXXX

State when first located in St. Croix, Virgin Islands:
March 5, 1951.

Type of business (State in detail products intended to be manufactured, processed, created or produced) or whether hotel or cottage resort project:
Primarily creative editorial, advertising, tourist promotion and merchandising counsel. This will include the editing, supervising and creating of books, magazines, sales promotion and tourist promotion data.
Date of commencement of construction XXXXXX
Date of commencement of operations: March 5, 1951.
Estimated average number of employees
Skilled 4 Semi-skilled 2
Unskilled 1
Utility_____ Other_____
Percentage of legal residents employed or intended to be employed:
100%

When did you first meet the requirements for exemption and industrial subsidy?
March 5, 1951. $10,000.00 cash was deposited locally April 10, 1951 for purchase of necessary operating equipment, etc., for which commitments will be made immediately upon approval of this application by the Governor or Acting Governor.
Details of demonstrable capital investment:

ITEMS	ESTIMATED AMT.
Office and Library Furniture & Eqpt.	$ 2,060.00
Remodeling, Painting & Air Conditioning	1,050.00
Reference Library to be Purchased	7,500.00
Photographic Equipment	975.00
Automobile	2,250.00
Working Capital	5,000.00
Estimated total	$19,375.00

Remarks
.....
.....
.....

Subscribed and sworn to before me at .....
by .....
this .....day of .....A.D. 195...

Notary Public

(SEAL)

The Tax Exemption Board of St. Croix hereby .....
recommends or
..... the above application for approval by the
disrecommends
Governor with the following reservations, viz:

_____

_____

_____

Tax Exemption Board, Municipality of St. Croix
195...

_____ _____

Secretary Chairman

APPENDIX H

Letter of July 10, 1951
Recommending Approval of Application

TAX EXEMPTION BOARD
Municipality of St. Croix
Christiansted, Virgin Islands, U.S.A.

Ludvig E. Harrigan, Sr.
Chairman

Address all Correspondence
to the Chairman

R. Norman Skeoch
Vice Chairman

RECEIVED
July 11, 1951
Government Secretary's Office

Charles H. Emanuel
Secretary

July 10, 1951

The Honorable Daniel W. Ambrose
Act. Governor of the Virgin Islands
Charlotte Amalie, St. Thomas

Dear Sir:

Attached you will find formal application of Mr. Van B. Hooper, dated March 20, 1951, for Tax Exemption and Industrial Subsidy.

In accordance with the provisions of Municipal Council Bill No. 35, approved June 25, 1949, and the regulations issued thereunder, notices were published in the local papers, and a public hearing was held on July 6, 1951. No written objection to the application was received from interested parties.

The Board was in unanimous agreement to recommend the application, but, inasmuch as the demonstrable capital

investment of the applicant is for the most part located in the United States, and as Mr. Van B. Hooper wishes assuranee that this Exemption and Subsidy will be granted him upon transferring said assets to St. Croix, it is recommended by the Board that Mr. Van B. Hooper's application be tentatively approved conditional upon the transfer of said assets to St. Croix.

Since Mr. Van B. Hooper expects to return to the United States very shortly to arrange transfer of his office equipment and reference library, etc., it is requested that action on this recommendation be expedited as much as possible in order that he may know, prior to his departure, whether or not approval will be granted.

Respectfully submitted

.....	.....
Charles H. Emanuel Secretary	R. Norman Skeoch Vice Chairman

Office of Governor
Charlotte Amalie, V.I.

1. Approved, tentatively, conditional upon transfer by Mr. Hooper's of the assets in question to St. Croix.

/s/

Daniel W. Ambrose

APPENDIX I

Tax Exemption Certificate Granted to Van B. Hooper

THE GOVERNMENT OF THE VIRGIN ISLANDS

Hereby Makes Known

That, in Accordance with the Provisions of Ordinance to Provide Tax or Fee Exemptions and Industrial Subsidies in the Municipality of St. Croix,

Approved January 1, 1952

THIS CERTIFICATE

For Tax or Fee Exemptions and Subsidies is hereby granted to

VAN B. HOOPER

This Certificate is valid for a period of eight (8) years, and in accordance with the provisions of the decree approved by the Governor of the Virgin Islands on March 10, 1952.

Witness my hand and the seal of the Government of the Virgin Islands of the United States at Charlotte Amalie, St. Thomas, V.I., this 10th day of March 1952.

MORRIS F. DE CASTRO

/s/ Morris F. de Castro
Governor.

[SEAL]

MOTION FILED SEP 7 1966

LIBRARY
SUPREME COURT, U. S.

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 418

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER,
DECEASED,

Petitioner,

vs.

THE GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR JOHN D. MERWIN AS AMICUS CURIAE

JOHN D. MERWIN, Esq.,
P.O. Box 427
Frederiksted, St. Croix
U. S. Virgin Islands

THE MACK CO., NORTH HAVEN, CONN.

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 418

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER, DECEASED,

Petitioner,

vs.

THE GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

MOTION BY JOHN D. MERWIN FOR LEAVE TO FILE A BRIEF, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

John D. Merwin respectfully moves this Court for leave to file as amicus curiae a brief in support of the petition for certiorari filed on behalf of the Estate of Van B. Hooper in the above case. The consent of the attorney for petitioner has been obtained. The consent of attorney for respondent was requested but refused.

Movant was Governor of the Virgin Islands from September 1958 to April 19, 1961. In 1961 Movant received an audit report from the Office of the Comptroller of the Virgin Islands. This report recommended that no further subsidy payments be made to Mr. Hooper and that efforts be made to recover subsidies already paid on the ground that the grant of subsidy had been recommended and approved arbitrarily. Movant offi-

cially and unequivocably rejected the suggestion and the reasoning of the audit report and stated categorically that "no action will be taken by the executive branch of the Government" to terminate Mr. Hooper's subsidy or recover payments made thereunder.

In view of the strong position taken by Movant against any attempt to attack the validity of the contract between Mr. Hooper and the Government of the Virgin Islands the decision of the Court of Appeals for the Third Circuit holding that the grant of the subsidy and the continuing payments made under the grant were arbitrary inevitably reflects adversely on Movant's judgment and competence and on the qualifications of his Administration. The decision, if allowed to stand, will have a continuing adverse effect on Movant's reputation.

Moreover, Movant as citizen, property owner and member of the Bar of the Territory and as a former Governor of the Virgin Islands has a continuing interest in the success of the program for the development of that territory and in the preservation of the executive powers inherent in the office of the governor, both of which Movant respectfully submits are threatened by the decision of the court below.

Finally, as one who has approved a number of such subsidy grants and has himself been involved in payments under the grant here in question, Movant is concerned that this program should not become a trap by which unwary investors are lured to the Virgin Islands with the promise of a subsidy and then deprived of the benefits of the program.

For the foregoing reasons Movant respectfully requests permission to file a brief amicus curiae in the above case.

Respectfully submitted,

JOHN D. MERWIN, *Pro se.*

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 418

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER, DECEASED,

Petitioner,

vs.

THE GOVERNMENT OF THE VIRGIN ISLANDS,

Respondent.

BRIEF FOR JOHN D. MERWIN AS AMICUS CURIAE

INTEREST OF JOHN D. MERWIN AND STATEMENT OF FACTS

Van B. Hooper applied for subsidy to the Tax Exemption Board on March 20, 1951.[1] The Tax Exemption Board, after careful investigation, unanimously recommended, and the Governor granted, tentative approval of the grant on the condition that Mr. Hooper make the investment in the Virgin Islands required by law.[2] This conditional approval was required because Mr. Hooper was unwilling to commit the re-

[1] Pet. App. (petitioner's appendix) F at p. A-43.
[2] Pet. App. H at p. A-48.

quired investment to the Virgin Islands without substantial assurance that he would receive a subsidy.[3]

Mr. Hooper then made the required investment and was formally granted a subsidy on March 10, 1952.[4] This grant was made under Municipal Council Bill No. 39 which was a somewhat expanded version of Municipal Council Bill No. 35 under which Hooper's application had been made. Governor de Castro, who approved Hooper's grant, was acting governor when Bill No. 35 was enacted [5] and governor when Bill No. 39 was enacted.[6]

The grant to Mr. Hooper was in no sense concealed from the public. On the contrary, as the first subsidy issued under Bill No. 39 (and no subsidies had been issued under Bill No. 35) a considerable ceremony was made of the grant.[7]

Both Bills No. 35 and 39 contained in section 6, a provision permitting any interested party to object to the grant. Despite this provision and the publicity there is no indication of any opposition to the issuance of the grant.

In mid-1959 the comptroller of the Virgin Islands filed an audit report charging various, relatively minor, discrepancies in Mr. Hooper's return. This report was the subject of extensive intra-governmental correspondence over the next one and one-half years.[8] Amicus was then governor and at no time

---

[3] *Ibid.*, p. A-49.
[4] Pet. App. I at p. A-50.
[5] Pet. App. C at p. A-30.
[6] Pet. App. D at p. A-39.
[7] Memorandum from Evan Francois to Cyril E. King. Appendix for appellee-respondent filed in the Court of Appeals, at p. 27a.
[8] *Id.*

during this period was there any question as to the propriety of the basic grant to Mr. Hooper. It was not until February 20, 1961, after one and one-half years of discussion and correspondence on the details of the amount of the subsidy payable and less than a month before the subsidy period was to expire by its own terms on March 4, 1961, that the comptroller raised the issue of the legality of the grant.[9]

The comptroller's special re-audit report of February 20, 1961, attacked the grant largely on a number of technical procedural points but also on the ground that since Mr. Hooper was not engaged in creating a product, his business was not within the act. The comptroller recommended that no further subsidies should be paid and that efforts should be made to recover subsidies already paid.[10]

Amicus categorically rejected this recommendation on the ground that it would be an abdication of the powers of the executive and legislative branches of government and an impairment of a valid contract and announced that no action would be taken to implement the comptroller's recommendations.[11]

Shortly after the retirement of Amicus as Governor of the Virgin Islands, and during the administration of Governor Paiewonsky, a full investigation of the grant was undertaken by the Tax Exemption Board and by the Attorney General of

---

[9] *Ibid.*, p. 31a.

[10] Memorandum of December 29, 1961, from Francisco Corneiro, Attorney General, to Executive Secrteary. Appendix of appellee-respondent filed in the Court of Appeals, p. 19a.

[11] Letter of March 17, 1961, from John D. Merwin to Peter Bove. Appendix of appellee-respondent filed in the Court of Appeals, at p. 24a.

the Virgin Islands. Both the Tax Exemption Board [12] and the Attorney General [13] fully supported the position that the grant to Hooper was within the power of the Board and was a contract binding on the Government of the Virgin Islands.

The Hooper grant was again attacked, after the death of Mr. Hooper, by the creditor's claim filed by the Government of the Virgin Islands which claim was rejected by the executor and the United States District Court for the Virgin Islands. The United States Court of Appeals for the Third Circuit reversed.

ARGUMENT

The Court of Appeals for the Third Circuit has basically misconstrued the nature of the function of the Tax Exemption Board and the Governor under the Virgin Islands investment incentive program as set out in Bill No. 35 and Bill No. 39. The Court has treated the Tax Exemption Board as a mere contract officer or procurement agent and applied to it the principle that the decision of such an agent may be overturned at any time in the future that a court may determine that his decision was incorrect as a matter of law. In fact, the Tax Exemption Board, acting in conjunction with and under the supervision of the Governor, is an administrative agency with rule making and adjudicative or quasi-judicial as

---

[12] Memorandum from Evan Francois to Cyril E. King. Appendix for appellee-respondent filed in the Court of Appeals, at p. 27a.

[13] Letter of March 17, 1961, from John D. Merwin to Peter Bove. Appendix of appellee-respondent filed in the Court of Appeals, at p. 24a.

well as investigative functions. As an administrative agency, its decisions are binding even if erroneous. Errors may, of course, be corrected by appeal but a decision, even if erroneous as a matter of law, is binding and may not be collaterally attacked if the matter is within the jurisdiction of the agency, that is, if the issue is of the general type the agency is empowered to decide, *National Labor Relations Board* vs. *Pappas & Co.*, 203 F.2d 569, 571 (9th Cir. 1953), *Callahan Road Improvement Co.* vs. *United States*, 345 U.S. 507 (1953).

This rule may not be avoided by the simple expedient, employed by the Court below, of holding that the Board's and the Governor's power is limited to recommending and granting subsidies authorized by law and that, therefore, the Board lacked jurisdiction to recommend a grant which the Court subsequently decided was not within the terms of the Bill. This would make the Board's jurisdiction completely dependent on the correctness of its ultimate decision on the merits and would deprive its decision of any finality.

It can hardly be denied that the Board had jurisdiction to determine whether Mr. Hooper was entitled to a subsidy. Thus, Bill No. 35 provides in section 5(a) that the

> "Board shall exercise the following powers and authority subject to the approval of the Governor:
>
> "1. Investigate all applications for tax or fee exemptions and for the grant of subsidies hereunder and recommend to the Governor that such applications be approved or disapproved in accordance with the provisions of this ordinance; . . ."

And 5(a) of Bill No. 39 contains a similar provision. Since the Board had jurisdiction to decide on Hooper's application for a subsidy, that decision, even if erroneous, could not prop-

erly be challenged in a collateral proceeding such as the one before the Court.

The doctrine that an erroneous decision on the law by the Board deprives it of jurisdiction poses a threat not only to the security of all grants made under the Virgin Islands subsidy program, a security essential to the success of such a program, but a threat to the finality of decisions of administrative agencies of all types and urgently requires correction by this court.

Moreover, it is respectfully submitted that the grant of the Hooper subsidy should have been sustained on the merits. Bill No. 39 under which the grant was made expressly stated in section 2 that a person was eligible for a subsidy if

> "duly qualified to do any business in the municipality of St. Croix involving the manufacture, processing, creation or production of any articles or commodities *or carrying on any business* which were not being manufactured, processed, created, produced *or carried on* within the said municipality within the year 1947. . . ." (emphasis added)

The Court below chose to construe "any business" as not including personal service businesses on the ground that such businesses would not be beneficial to the economy of the Virgin Islands. This holding is inconsistent with the language of Bill No. 39 and is made without any supporting legislative history. Furthermore, this holding overrules the approval of the grant by Governor de Castro who, as acting governor when Bill No. 35 was enacted and as governor when Bill No. 39 was enacted, was in a far better position than the Court of Appeals to know the intention of the Municipal Council in enacting these Bills.

In addition to the necessity of protecting the finality of the decisions of administrative agencies, the decision of the Court

of Appeals should be reviewed and reversed by this Court to correct a manifest injustice to Mr. Hooper and to discourage unconscionable governmental behavior of the type represented by the attack on this grant.

Mr. Hooper invested money in the Virgin Islands and maintained his investment in reliance on the promise of the Government of the Virgin Islands, which promise the Municipal Council has endeavored to make a binding contract by every means available to it. Now, over 14 years after issuing the grant, the Government of the Virgin Islands, dissatisfied with the over one quarter of a million dollars which it has received from Mr. Hooper and which it would not have received but for the grant of the subsidy, seeks to obtain an additional windfall of over a million dollars. Such conduct, shocking under any circumstances, is particularly unfair in the context of this case.

Thus, the Court of Appeals placed great emphasis on the alleged fact that Mr. Hooper intended to do in the Virgin Islands only the same things which he had previously done as editor of *Ideals*.[14] In fact, there is no evidence in the record that Mr. Hooper intended, when making his application, to limit himself to acting as an editor for *Ideals*. The application itself shows that he proposed to engage in "creative editorial, advertising, tourist promotion and merchandising counsel," without any indication that *Ideals* would be his only client or customer.[15] The implied finding that this application was untruthful in this regard and the attack on the grant on that basis is particularly unfair since Mr. Hooper is now deceased and unable to testify as to his intentions and conduct.

---

[14] Pet. App. B at pp. A-16-A-17.

[15] Pet. App. F at p. A 43.

The cavalier disregard of its commitments which the Government of the Virgin Islands has shown by the institution of this suit turns the investment subsidy program into a trap for unwary investors and should not be rewarded by the windfall which would result from requiring a return of the subsidies paid.

CONCLUSION

For the foregoing reasons the petition for the Writ of Certiorari filed by the Estate of Van P. Hooper should be granted.

Respectfully submitted,

JOHN D. MERWIN, *Pro se*

August 26, 1966

CERTIFICATION

I, John D. Merwin, Amicus Curiae, hereby certify that a copy of the foregoing Motion for Leave to File Brief Amicus Curiae, and Brief of Amicus Curiae, was served on the following counsel by depositing the same in the United States Mail with postage prepaid on September 6, 1966:

Parties	*Counsel of Record*
Government of the United States.	Almeric L. Christian, Esq. Charlotte Amalie St. Thomas, Virgin Islands
Estate of Van B. Hooper, Deceased.	Warren H. Young, Esq. Young, Isherwood & Marsh 46 King Street Christiansted, St. Croix U. S. Virgin Islands, 00821
	James W. Ashley, Esq. Theodore A. Groenke, Esq. John J. Voortman, Esq. McDermott, Will & Emery 111 West Monroe Street Chicago, Illinois, 60603

JOHN D. MERWIN, Esq.,
A member of the Bar of this Court.

Office-Supreme Court, U.S.
FILED
SEP 9 1966
JOHN F. DAVIS, CLERK

No. 418.

IN THE

Supreme Court of the United States

October Term, 1966.

IN THE MATTER OF THE ESTATE OF
VAN B. HOOPER, Deceased,
Petitioner,

v.

THE GOVERNMENT OF THE VIRGIN ISLANDS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

ALMERIC L. CHRISTIAN,
Special Counsel to Government of the Virgin Islands,
P. O. Box 1441,
St. Thomas, Virgin Islands 00801.

Huntzinger Printing Corp., *Appellate Printers,* Camden, N. J.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Argument	3
Conclusion	8

TABLE OF CITATIONS

CASES:

Everlasting Development Corporation, et al. v. Sol Luis Descartes, et al., 192 F. 2d 1 (1st Cir. 1951) 7

King Christian Enterprises v. Government of the Virgin Islands, 345 F. 2d 633 (3rd Cir., 1965) 6

Laymen v. State Unemployment Compensation Commission, et al., 167 Ore. 379, 117 P. 2d 974 5

STATUTES:

28 U. S. C. Sec. 1254(1) 2

Section 22, Revised Organic Act of the Virgin Islands, 68 Stat. 506 (1954), 49 U. S. C. Sec. 1612 8

Act, No. 184, approved May 13, 1948, Section 16, Laws of Puerto Rico (1948) p. 482 8

AUTHORITY:

42 Am. Jur., Public Administrative Law, Sec. 26, p. 316 5

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1966.

No. 418.

IN THE MATTER OF THE ESTATE OF VAN B. HOOPER, DECEASED,

Petitioner,

v.

THE GOVERNMENT OF THE VIRGIN ISLANDS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion and judgment of the District Court of the Virgin Islands (Pet. App. A) are unreported. The opinion of the court of appeals (Pet. App. B) is reported at 359 F. 2d 569.

JURISDICTION.

The judgment of the court of appeals was entered on April 22, 1966, and a timely petition for rehearing was denied on May 12, 1966. The petition for a Writ of Certiorari was filed on August 5, 1966. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Whether the Industrial Incentive Program of the Municipality of St. Croix, as embodied in Municipal Council Bills numbers 35 and 39, authorized the Tax Exemption Board to recommend and the Governor of the Virgin Islands to grant industrial subsidies to an individual who rendered personal professional service to a corporation located and operated outside of the Virgin Islands.

STATUTES INVOLVED.

Municipal Council Bill No. 35, Seventh Council—First Session, 1949, of the Municipality of St. Croix, Virgin Islands, and Municipal Council Bill No. 39, Eighth Council—First Session, 1951, of the Municipality of St. Croix, Virgin Islands, are respectively set forth in Appendices C and D to the petition.

STATEMENT.

Respondent does not accept the statement of Petitioner, set forth in its petition, pp. 2 to 5, inclusive. Respondent adopts as its statement of the facts material to the considerations of the questions here presented, the summary of the evidence contained in the opinion of the Court of Appeals.[1]

ARGUMENT.

1. The court of appeals correctly applied the ordinances involved in this case. Finding that "Hooper [merely] transferred his office equipment, library and photographic material from his office in Wisconsin to his office, and later to his home, in St. Croix, and thereafter performed in St. Croix services for his Company identical with some of the services which he had previously rendered to it in Wisconsin" (Pet.

---

[1] See Pet. App. B, pp. A-7 through A-12, and 359 F. 2d 569, 571-574.

App. A-16),, the court properly concluded as follows: (1) that the Tax Exemption Board and the Governor of the Virgin Islands, the former in recommending and the latter in granting tax exemptions and industrial subsidies to the decedent had exceeded their lawful authority and hence had acted arbitrarily; (2) that the Board as constituted on December 29, 1961, acted arbitrarily also in finding continuing qualification and compliance by Van Hooper under the industrial incentive program; and (3) that the Tax Exemption Board and the Governor had exceeded their powers under the pertinent ordinance in making the subsidy grant to Van Hooper. These conclusions are fully in accord with both the letter and the spirit of the applicable ordinances.

The Ordinances in question were enacted to effectuate the industrial incentive program of the Municipality of St. Croix. The language of the Bills made clear that the enterprises or businesses sought to be favored were those which were engaged in industry as that term is generally understood. Contemplated was a capital investment which would give new life to the economic development of the Municipality and which would endure as a "self sustaining" enterprise, utilizing the "natural resources" of the island, making the "economic life" of the community "as diverse and stable as possible". The reward held out upon qualification was an "industrial subsidy", a phrase which pervades Section 3 of Bill Nos. 35 and 39. It is specifically the "industrial subsidy" spelled out in that section, and allowed over a period of eight years (later extended to ten years) which the Board and Governor granted to Van Hooper and to which the Court below found the said decedent to be not entitled.[2]

---

[2] The precise language of Section 3, Bill No. 39 is printed in App. A, pp. A-33 to A-34.

Moreover the program contemplated an industry or business located in St. Croix. Even the most cursory examination of the facts of this case compels the conclusion that Van Hooper failed to meet this requirement, as the Court below found. It is therefore, the petitioner who advocates an interpretation contrary to the language, purpose and contemplation of the Ordinances.

2. There can be no serious question as to the authority of the court of appeals to review the action of the Board and to overrule its decision where, as here, that decision is found to have been beyond the Board's lawful authority. Authority to reverse arbitrary action, such as was found here, is expressly conferred in both of the ordinances in question:

> Decisions of the Board as to questions of fact shall be deemed final in any proceedings of any court except in such cases as it shall be conclusively shown that any such decision was arrived at by arbitrary or fraudulent means.[2]

Moreover, administrative boards are strictly limited to powers expressly granted, or such as are necessary by fair implication. 42 Am. Jur., Public Administrative Law, Sec. 26, p. 316. *Laymen v. State Unemployment Compensation Commission, et al.*, 167 Ore. 379, 117 P. 2d 974. Certainly it was an excessive exercise of authority by the Board to grant industrial subsidy and tax exemption to a concern not covered by the Ordinance. The Court below was amply justified in so finding. If then, as the Court found, the Board and Governor were without jurisdiction to act as they did, the consequences to decedent or to his estate of such a ruling is not a permissible consideration. Were this not so,

---

[2] The precise language of Section 3, Bill No. 39 is printed in App. A, pp. A-33 to A-34.

any contract between an agent or agency of government could go unchallenged, notwithstanding the agent's or agency's lack of authority to enter into the contract in question. True, the Ordinances declared grants of tax exemption and industrial subsidies to be in the nature of contracts, but this provision must be read to envisage a legally valid contract.

3. Contrary to petitioner, the decision below, finding arbitrary action by both Board and Governor, is consistent with the previous rulings of the court of appeals. *King Christian Enterprises v. Government of the Virgin Islands,* 345 F. 2d 633 (3rd Cir., 1965), is the case relied on by Petitioner in support of its allegation of inconsistency. The fact is that in that case the Court mentioned with approval each of the salient points of its holding in the instant case. The Court there said,

> It is quite clear that the Legislature intended to confer upon the Governor, and the Board as his advisor, wide discretionary power to carry out the legislative intent to benefit the economy of the Territory by extending the benefits of the tax exemption and subsidy program to appropriate individuals and corporations. This intent is highlighted by the provisions of Section 9(b) of the Act of 1957, V. I. Sess. L. 1957, p. 154, 33 V. I. C. (1958 Supp.) §4109(b), that decisions of the Board as to questions of fact shall be final and not judicially reviewable except when arbitrary or fraudulent action is conclusively shown. And it is expressly indicated by Section 4041 of 33 V. I. C., which was enacted by the Act of November 3, 1961, No. 798, V. I. Sess. L. 1961, p. 253, and which was in force when the Governor acted in this case. For that section limits the benefits of the program to those whose 'industrial

> or business activity, in the judgment of the Governor of the Virgin Islands will promote the public interest by economic development of the Virgin Islands, and which requires for its establishment or expansion the granting of the tax exemption and subsidy benefits provided for' by the Act . . .[3]

And again,

> But all this is not to say that the court was without power to review the action of the Board and the Governor in order to determine whether any error of law infected their proceedings or decision and to set aside the Governor's decision if such error was found and remand the case for further proceedings in accordance with the applicable rules of law properly applied. §§1421 et seq. of title 5 V. I. C. give the court this power . . .[4]

Furthermore, the assertion of Petitioner that the decision below upsets an interpretation of long standing is without basis in fact. The instant case, with respect to its particular issues is one of first impression.

Nor is there any conflict between the decision below and that in *Everlasting Development Corporation, et al. v. Sol Luis Descartes, et al.*, 192 F. 2d 1 (1st Cir., 1951). The comparison is most inapt for in that case the Court did not construe the Puerto Rican Industrial Incentive Act. Rather, the Court affirmed a judgment dismissing the complaint, on the narrow holding that on the facts of that case the factual allegation did not set forth a substantial federal claim within the jurisdiction of the District Court of Puerto Rico. It is noteworthy that the Court pointed out that the construction of an insular tax exemption statute is not a federal ques-

---

[3] At page 636.

[4] At page 637.

tion.[5] And, in any event, there is a basic difference between the Puerto Rican Act and the St. Croix Bills. The latter, as we have observed, made decisions of the Board reviewable in Court proceedings, albeit limited, the former made finding of its Executive Council final, with no administrative or judicial proceeding possible.[6]

4. The present case, though possibly of local interest in the Virgin Islands, presents no federal question of general importance. Petitioner's contention that the decision below imperils the entire Virgin Islands Tax Exemption Program is patent hyperbole. The question whether an applicant qualifies for tax exemption and industrial subsidies must necessarily be investigated and determined on a case by case basis. A diligent search has failed to disclose a single instance, other than the instant case, in which an applicant engaged in rendering personal or professional service was granted tax exemption and industrial subsidies under the Ordinances in question. Indeed, petitioner properly recognizes that the Board gave Van Hooper "special consideration" (Pet. 9).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ALMERIC L. CHRISTIAN,
Special Counsel to Government of the Virgin Islands.

September 1966.

---

[5] At page 6. The jurisdiction of the District Court of the Virgin Islands in the instant case was based on Section 22, Revised Organic Act of the Virgin Islands, 68 Stat. 506 (1954), 49 U. S. C. Sec. 1612.

[6] Act. No. 184, approved May 13, 1948, Section 16, Laws of Puerto Rico (1948) p. 482.